2009

Connie Florez v. Schindler Elevator Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CONNIE FLOREZ, Plaintiff and Appellee, vs. SCHINDLER ELEVATOR CORPORATION and DOES I-V, Defendant and Appellant.	:	Case No. 20090299-CA

BRIEF OF APPELLEE

Appeal from the Second Judicial District Court of Weber County, State of Utah
Civil No. 050902302
Honorable Ernie Jones and W. Brent West

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

JURISDICTION

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. §78A-4-103(2)(j) .

ISSUES AND STANDARDS OF REVIEW

ISSUE 1: **Summary Judgment on Causation Can Only Be Granted Where Schindler Shows No Genuine Issues of Material Fact Remain. Schindler Only Demonstrated Alternative Theories of Causation, Not a Complete Absence of Cause.**

"In reviewing a grant of summary judgment, the appellate court will view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Walter v. Stewart*, 2003 UT App 86, ¶ 2, 67 P.3d 1042. "The district court's legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness." *Massey v. Griffiths*, 2007 UT 10, ¶ 8,152 P.3d 312.

ISSUE 2: **An Affidavit Need Only Be Made on Personal Knowledge and May Contain Statements Regarding Injury Causation. Florez' Affidavit Recited Her Personal Knowledge of Events and Injury Causation.**

"[A] trial court decision to admit evidence is reviewed under a broad grant of discretion." *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 25, 982 P.2d 65.

ISSUE 3: **Expert Witnesses May Rely on the Testimony and Records of Other Witnesses in Reaching Their Conclusions. Dr. Morgan Relied, As Do Many Doctors, on the Diagnoses and Records of Other Physicians.**

"The trial court has wide discretion, and such decisions are reviewed under an abuse of discretion standard." *Walker v. Hansen*, 2003 UT App 237, ¶ 20, 74 P.3d 635.

ISSUE 4: **Reversing Denial of a Motion For New Trial or Judgment Notwithstanding the Verdict Requires Marshaling the Evidence and Showing How It Could Not Support the Verdict. Schindler Does Not Marshal the Evidence.**

Reversing a denied motion for new trial or judgment notwithstanding the verdict obligates the appealing party to "marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992). Thereafter, this Court reviews "the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict.'" *White v. Fox*, 665 P.2d 1297, 1300 (Utah 1983).

DETERMINATIVE PROVISIONS, STATUES AND RULES OF CENTRAL IMPORTANCE TO THE APPEAL

Utah Rule of Civil Procedure 56
Utah Rule of Evidence 702
Utah Rule of Evidence 703
Utah Rule of Evidence 705
MUJI 2nd CV 2018
Utah Rule of Civil Procedure 59
Utah Rule of Civil Procedure 61
(full texts attached as Addendum A)

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

Defendant Schindler Corporation admitted liability in this personal injury case. Left with only causation and amount of damages as a defense, Shindler Corporation chose to attack on two fronts. First, they attempted to demonstrate through an exhaustive

examination of the medical record that their negligence did not cause injury. However, Schindler did not even bother to call witnesses who could testify to the major injury suffered by Connie, BPPV. Second, perhaps recognizing the weakness in objective facts supporting their defense of medical causation, Schindler Corporation chose to attack the credibility and personal veracity of the plaintiff, Connie Florez. By personally attacking Connie Florez, Schindler opened a door to much of what they claim as error on appeal. Schindler should not be allowed to call into question the credibility and veracity of Connie Florez, and then claim reversible error when they find testimony and rebuttal argument made by counsel unpalatable.

Following four days of testimony from nine witnesses, eight of the witnesses having testified on behalf of Florez, the jury returned a verdict in favor of Florez. Florez submitted $23,040 in past medical expenses; the jury awarded her $17,032.31. Florez sought more than $125,000 in future medical expenses; the jury awarded her $93,350.00. Counsel argued that Florez' loss of quality of life should be equivalent to three or four times the amount the jury determined Florez needed for medical care resulting from the incident. The jury's award for noneconomic damages was only two times the amount of their determination of Florez' economic damages. Clearly, the jury carefully weighed the evidence and argument and rendered a balanced verdict which did not give either side all that they were seeking.

Statement of Facts Relevant to the Issues Presented for Review

1. The Incident and Resulting Lawsuit

Schindler operated and maintained elevators at the 23rd Street and Wall IRS building

in Ogden, Utah. Since this IRS building opened in 2001, and for some period after Appellee's incident in 2004, Schindler's elevators repeatedly malfunctioned. (R. 185 at 8:21 - R. 186 at 9:22) In the early summer of 2004, Connie Florez was working at the 23rd Street IRS building in Ogden, Utah. While returning from her thirty minute lunch break, Schindler's elevator again malfunctioned, coming to a dead stop, and leaving Connie trapped inside. (R. 909 at 245-49).

Approximately seven feet wide by ten feet tall, Schindler's elevator lacked air conditioning and cooling. (R. 909 at 251:15-252:2) Florez contacted Schindler for assistance by pushing a help button located inside the elevator. (R. 909 at 252:23-253:4) Schindler indicated it could be at least an hour before assistance arrived and Schindler would contact Florez. (R. 909 at 253:17-18)

After the initial abrupt halt of the elevator, the elevator made four additional movements. As Schindler's elevator repeatedly rose and fell, Florez leaned against the wall and gripped onto the rails located inside the elevator. (R. 909 at 249:16-17) As time passed and Florez received no contact from Schindler, co-workers gathered, attempting to release Florez from the elevator. (R. 909 at 260:1-10)

The temperature inside the elevator escalated, and so did Florez' anxiety. (R. 909 at 254:10-255:3) After being trapped for more than thirty minutes in the heat, and along with her increasing anxiety, Florez began having heart palpitations. Shouting through the closed elevator to co-workers, Florez requested her heart medicine from inside her purse. (R. 909 at 256:5-11) Florez' co-workers worked together to try and open the doors. The IRS

employees pried open the doors just long enough to throw Florez' purse through the small opening. (R. 909 at 256:5-11) Florez took a nitroglycerin pill for her palpitating heart. (R. 909 at 257:2-11)

After almost an hour after being trapped in Schindler's hot elevator (R. 909 at 255:8-12) and without Schindler appearing or calling with an update (R. 909 at 257:17-25), two IRS employees manipulated an overhead release latch to open the doors, allowing Florez to escape the elevator. (R. 908 at 97:4-6; R. 908 at 98:20-25) When the doors opened, Florez was sitting on the ground, braced against the wall, fearing further movement of the elevator. (R. 908 at 71:25-72:6) She was extremely anxious, tired, and overheated. Although Florez looked "scared, very scared" when the doors opened, she came to her feet and attempted to exit. (R. 908 at 98:3-9; R. 908 at 128:8-13)

After taking her first step or two outside of the hot elevator, the cold air hit Florez and she blacked out. Florez fell on her left side, hitting her head, ribs and shoulder. (R. 909 at 267:16-23) Witnesses testified Florez blacked out extremely suddenly, hitting the floor "like a sack of potatoes". Eyewitness testimony further indicated Florez' head "bounced" off the hard floor and made a "loud noise" when it hit. (R. 908 at 75:8-9; R. 908 at 98:21-22) When Florez regained consciousness, she was pale, grey and her body was physically shaking. (R. 908 at 79:5 and R. 908 at 130:13-17) Emergency personnel arrived, placed an IV, put Florez on a backboard, and transported her to the emergency room. (R. 909 at 262:14-21) Florez was extremely nauseous; she repeatedly heaved during the ambulance ride to the hospital. (R. 909 at 263:19-25; Plaintiff's Exhibit 115; Defendant's Exhibit 41)

At the hospital, E.R. staff attended to Florez. (R. 909 at 264:1-12) Florez had pain in her head and her entire left side. (R. 909 at 264:10-14) Florez spent several hours in the emergency room; the primary concern was blood work and an EKG to determine if Florez' fainting was related to her heart condition. The physician ruled out any heart issue and concluded Florez suffered from a "Vasovagal syncopal episode and Hypokalemia," or, in laymen's terms, anxiety, nausea, respiratory distress, and fainting due to her stressful situation and overheating. *Merriam-Webster's Medical Dictionary (1995).* (R. 0171 and R. 910 at 375:1-3; R. 910 at 379:21-380:13) After determining that Florez had fainted and was not suffering a serious heart condition, staff instructed Florez to follow-up with her primary physician for additional complaints. (R. 0158)

The next day, Florez visited a primary care provider. When it was discovered Florez had been injured at her workplace, Florez was sent home with instructions to return after notifying workers compensation. These facts were documented by the clinic. (R. Plaintiff' Exhibit 115 at 035) However, Schindler chose to use this forestalled medical visit to attack Florez and her supervisor's credibility, implying these witnesses lied when they represented Florez missed work the following day to go the doctor. (R. 908 at 92:2-21; R. 911 at 679:16-680:1)

Within two days of the incident, Florez received care and began physical therapy treatment for her neck and rib injury. Within a few months, multiple providers determined that when Florez' head bounced off the ground, the Odoconia in her ear broke, leaving Candaliths loose in the ear canal, resulting in a condition called Benign Paroxysmal Positional

Vertigo or "BPPV." At trial, the Candaliths or loose Odoconia were described, and interchangeably referred to, as "crystals" inside of the ear. Once these crystals break, the individual experiences permanent vertigo; the vertigo can wax and wane in severity but, it can only improve with daily exercises, as well as periodic medication and medical manipulation of the ear canal by a trained professional. (R. 909 at 290:10-23; R. 910 at 436:8-22; R. 910 at 443:15-19; R. 910 at 410:9-17; R. 910 at 467:12-16)

Schindler argues Florez had BPPV prior to her 2004 fall. However, the medical testimony unanimously agrees that trauma causes BPPV. (R. 910 at 476:8-9; R. 910 at 402:3-6). Schindler offers no evidence, or explanation, of how or when Florez previously injured her head and left ear. Instead, Schindler claims that BPPV could be obtained from the migraines or viral infections in Florez' history **but this was refuted.** (R. 910 at 467:17-25; R. 910 at 475:6-9) Florez was not diagnosed with BPPV prior to her fall, nor was she given the daily treatments or periodic medication needed to treat BPPV prior to her fall. (R. Plaintiff's Exhibit 116)

Florez openly admits she experienced prior incidents of dizziness associated with miscellaneous medical conditions, particularly with her heart condition and the resulting treadmill tests. Yet, Florez had never experienced the persistent, unrelenting, dizziness that occurs with BPPV. Individuals can experience dizziness or vertigo for a variety of reasons and yet, it does not mean they have BPPV. (R. 910 at 416:23-417:4; R. 910 at 481:23-482:1; R. 910 at 403:6-11)

Schindler presents an incomplete and erroneous picture, consistently omitting any facts or context of prior dizziness. (R. 910 at 405:2-17; R. 908 at 61:11-62:6) Schindler's appeal lists nine instances of dizziness complaints over approximately fifteen years. Seven of the nine instances were documented when Florez was being treated for her heart[1]. (R. Plaintiff's Exhibit 116 at PE 026, 022, 003, 013, 038-39, 030, 058). Schindler refuses to accept the medical testimony and *insists* all records of prior dizziness equate to Florez having BPPV prior to 2004 - **no medical expert agrees with Schindler's conclusion.**

By contrast, the evidence before the jury and part of the record on appeal, firmly establishes Florez' position that the 2004 trauma caused her BPPV. Two years prior to her collapse and trauma after exiting the elevator, in March of 2002, an Ear Nose and Throat Specialist performed a 'Dix-Hallpike Maneuver' on Florez when she visited him with vertigo and swollen glands. The Dix-Hallpike Maneuver is the initial step, in a series of steps, to diagnosing BPPV. A positive Dix-Hallpike causes nystagmus in the patient's eyes. (R. 910 at 455:18-25) Florez' Dix-Hallpike did not demonstrate BPPV. (R. 910 at 465:20-466:8) The March 2002 record referenced an inner ear infection and the physician concluded Florez was suffering from inflammation of her ear, not BPPV. (R. 910 at 424:10-12)

Inflammation of the ear can cause temporary vertigo, but resolves without assistance. Consistently, Florez did not complain of vertigo for two years following resolution of the diagnosed inflammation. (R. Plaintiff's Exhibit 117) The ENT who conducted the 2002

[1]Schindler's brief erroneously cites to tab 2 and 11 of it's trial exhibit; (Schindler's Brief p. 11, b and g). The citation in those instances should read tab 3 and 14 of Schindler's medical exhibit. Also, Schindler's reference to a record dated 12/12/90 should read 12/10/90. Florez references the same medical records in Florez' trial exhibit, for the court's convenience.

examination, relied upon by Schindler as definitive evidence of pre-existing BPPV, was Dr. Siddoway. (R. Plaintiff's Exhibit 117) Dr. Siddoway testified at trial and his testimony was aggressively challenged by Schindler. Dr. Siddoway remained firm in his conclusion that Florez did not suffer from BPPV in 2002. (R. 910 at 465:1-8)

Dr. Siddoway concluded that Florez began suffering from BPPV in 2004, following her fall at the IRS building. (R. 910 at 424:18-425:5) Further, Dr. Siddoway testified that the condition that Florez presented with following the fall in 2004 was not the same problem that she had two years earlier when she saw him in March of 2002 with vertigo. (R. 910 at 425:10-12).

2. Schindler's Motion for Summary Judgment

On March 13, 2005, Florez filed a Complaint in Second District Court. During two years of litigation, Schindler's litigation efforts involved a single discovery request and the deposition of Florez. Schindler then filed a Motion for Summary Judgment on April 30, 2007. (Docket at 1).[2] Judge Jones presided over Schindler's Motion for Summary Judgment and denied the request. (R. 0323;0327)

Schindler premised summary judgment on a two pronged causation argument. First, Schindler suggested causation could not be shown because Florez blacked out due to nitroglycerin rather than being trapped in the elevator. Schindler offered no medical

[2] With the exception of deposing Florez' retained expert, Dr. Morgan, after filing the Motion for Summary Judgment, Schindler engaged in no other discovery during the entire three years of litigation leading up to trial. (Docket at 1-3). Indeed, the whole of Schindler's case on appeal is an attempt to take a second bite at the apple. Failing to pursue a meaningful defense below, Schindler asks this court to second-guess the district court judges rulings and set aside the verdict reached by a jury who, after deliberations, gave Florez less than she asked in compensation.

testimony or competent, admissible evidence to support their argument. Schindler supported their theory of causation solely by reference to an internet website www.howthingswork.com. Schindler never produced a medical expert that agreed with their position and, ultimately, Schindler abandoned the argument at trial.

By contrast, Florez attached an affidavit asserting that she had never experienced a fainting side effect from her nitroglycerin during the many years she had been on the medication. (R. 0179-81) Further, Florez attached the Emergency Room Record, wherein the doctor diagnosed her as suffering from a vasovagal syncopal episode and hypolkalemia. (R. 0217) Perhaps more importantly, it was undisputed that Florez' ingestion of nitroglycerin was necessitated by her prolonged entrapment in the elevator. (R. 0173, ¶ 1). Accordingly, even if the heart medication caused the fainting, Florez only took the medication because of anxiety and heart palpitations *as a result of being trapped in Schindler's elevator.*

Second, Schindler attacked causation of Florez' BPPV injury by pointing to prior episodes of vertigo. In opposition, Florez relied on Dr. Morgan's expert report. Dr. Morgan's report indicated Florez suffered a 4% permanent impairment from BPPV related to the elevator incident. (R. 0205-11) Schindler, presented no counter-evidence or expert on the issue of BPPV. Further, Schindler characterizes Florez' affidavit as her "sole" evidence of causation on summary judgment. (Schindler's Brief at 6, ¶ 1) Although Schindler neglects to explain its omission of Dr. Morgan's causation opinion, Schindler assumably interprets Dr. Morgan's report as failing to offer a causation opinion. Notably, Judge Jones (R. 907 at 13:12-25), Judge West (Addendum B, at 26:1-4;) and Dr. Morgan (R. 0399 at 13:17-24; R.

910 at 380:11-13; R. 910 at 381:9-12; R. 910 at 382:7-17), all reject such an attempted interpretation by Schindler. The record on appeal supports the trial court's finding "that there really is a dispute of fact here as to causation". (R. 907 at 13:19-20)

Under the "Impression" section of Dr. Morgan's Independent Medical Examination, it states *"Benign positional vertigo [BPV] as related to the elevator incident."* (R. 0209) Schindler complains that the word "causation" is no where in Dr. Morgan's report. (Schindler's Brief at pg 6-7, ¶ 2) Schindler omits that Dr. Morgan utilized the phrase "as related to" the elevator incident versus the phrase "as caused by" the elevator incident. Dr. Morgan in his deposition was asked ". . . what did you mean by the term 'as related to'?" and Dr. Morgan's response, " - - that was causation related to the elevator accident". (R. 0399 at 13:17-24).

Dr. Morgan reaffirmed causation at trial. (R. 910 at 380:11-13; R. 910 at 381:9-12; R. 910 at 382:7-17). Further, at trial Dr. Siddoway confirmed the accuracy of Dr. Morgan's opinion by refuting Schindler's argument that Florez' had BPPV in 2002, prior to the fall. (R. 910 at 425:10-13; R. 910 at 465:1-8;)

3. Florez' Affidavit

In opposition to Schindler's motion for summary judgment, Florez submitted an affidavit disputing multiple facts. Florez' affidavit (R. 0179-81) opposed Schindler's inaccurate representations that: (1) Florez undisputedly fainted because she ingested nitroglycerin; (2) Florez undisputedly suffered no anxiety while inside the elevator; (3) Florez undisputedly suffered no symptoms after she fainted; and, (4) Florez obtained no medical treatment as a result of the fall. (R. 0162-63; R. 0167) Florez further disputed Schindler's

facts with medical records and deposition testimony. (R. 0183-217) Florez simply recited, in sequential order, her description of the events that transpired, as set forth above.

Schindler moved to strike the affidavit of Florez at the trial court and Judge Jones denied that request, indicating he did not find Florez' affidavit ". . .out of line. I mean normally the one who has been injured is the first person you want to talk to find out what happened." (R. 907 at 14:7-9)

4. Dr. Morgan's Testimony

Prior to trial, Schindler filed a motion to exclude Dr. Morgan, relying on multiple arguments. Judge West denied Schindler's motion. [3] (R. 656; Addendum B) First, Schindler sought to exclude Dr. Morgan because the diagnosis was made by Dr. Siddoway, not Dr. Morgan. (R. 353) Second, Schindler argued that Dr. Morgan's opinion was "based not on any expertise but rather on a flawed conclusion." (R. 353). However, Schindler offered no competing expert opinion or any authority to challenge Dr. Morgan's methods or means by which he reached his opinion.

The evidence of record demonstrates Dr. Morgan is highly competent in evaluating causation of injuries as he is the specialist used for this type of exercise of reviewing records and performing examinations to determine causation. Dr. Morgan has been performing this exact task for over a decade at the request of individuals, other physicians and government entities. (R. 910 at 366:15-370:24)

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[3]Schindler claims that "arguments on Schindler's Motion in Limine were conducted in chambers and no transcript of the argument exists". (Schindler's Brief at 2, FN1) In actuality, counsel were present when the arguments took place in the courtroom. Florez provides the transcript from this hearing as Addendum B.

Schindler's campaign against Dr. Morgan derives from isolating incidents in Florez' fifty-six year medical history wherein dizziness is noted as a complaint and then using those instances to conclude Dr. Morgan's opinion is wrong, and therefore, incompetent. (R. 0366, ¶3) Schindler is unable to produce a medical expert to medically validate Schindler's position. More specifically, Schindler has been unable to establish any of the prior instances amounted to BPPV rather than just dizziness as a symptom associated with heart arrhythmia or viral inflammation. The unrefuted and unchallenged testimony from the medical experts is that Florez' prior dizziness did not equate to BPPV. (R. 910 at 425:10-13)

5. Testimony and Notice of Florez' Medical Expenses

Schindler requests a directed verdict by representing Florez "did not present one shred of evidence" on Florez' medical expenses. (Schindler's Brief at 43, ln 4-5) In actuality, three medical experts[4] testified to the summary of medical expenses incurred by Florez and admitted into evidence. (R. Plaintiff's Exhibit 117) First, Dr. Morgan testified he refers individuals out routinely as part of his work for workers compensation and therefore, has knowledge of medical costs in the community. He testified he reviewed the costs detailed in Florez' Medical Expense Summary and found them to be reasonable and necessarily incurred as a result of the 2004 elevator incident. (R. 910 at 383:22-384:8) Second, Dr. Amann's testimony confirmed the reasonableness and need for Florez' neck and rib expenses. (R. 909

[4]Contrary to Schindler's representation, Dr. Amann and Dr. .Siddoway were not precluded from offering expert testimony. (Schindler's Brief at 7-8) Rather, the trial court found that without production of a Rule 26 report, the treating physicians could "give opinions, expert opinions, within their expertise . . ." but, they were not allowed to "extrapolate it out", i.e. offer legal causation. (Addendum B at 17:15-19; R. 909 at 154:13-155:8) There is no evidence the physicians exceeded this one limitation set by the court.

at 186:9 - 188:22) Third, Dr. Siddoway's testimony confirmed the reasonableness of expenses specific to Florez' BPPV. (R. 910 at 447:3-448:19)

Florez' medical expense summary was properly admitted under Rule 1006 of the Utah Rules of Evidence. Schindler alleges error, claiming Schindler never received the underlying invoices required by Rule 1006. (Schindler's Brief at 43, ln 5) However, the record demonstrates eight occasions, prior to trial, on which Schindler had been provided the invoices underlying Florez' medical expense summary. (R. 0518) The ninth production occurred the first day of trial, in front of the court. The trial court found Schindler had received notice of the underlying expenses. (R. 911 at 729:12-14)

Based on the court's ruling of notice, Florez' never burdened the jury with the overwhelming invoices. Yet, due to Schindler's unrelenting objection that Florez' summary was insufficient without the invoices, Florez stipulated to Schindler providing the jury with four medical expense summaries created by Schindler. (R. 911 at 722:6-729:10; R. 0638-42) Evidencing Schindler had received the underlying invoices, Schindler's counsel created its own medical expense summaries. (R. 911 at 689:3-12) Those summaries reflected Schindler's various arguments, i.e. the majority of expenses can actually be discounted as treatment for neck and back (R. 911 at 689:13-23) only two thousand of the expenses are related to her rib injury, (R. 911 at 693:19-694:1), you should only award the ER visit and ambulance ride (R. 911 at 703:15-704:4), etc. While Florez disagreed with Schindler's

categorization of Florez' expenses, these summaries were provided to the jury and nullify any alleged prejudice to Schindler. Schindler's compilation and submission of its own medical expense summaries to the jury demonstrates adequate access to the invoices underlying Florez' medical expense summary. (R. 0638-42)

With respect to Florez' future medical expenses, no itemized numbers were admitted into evidence. The jury was asked to determine this amount based on the medical testimony that Florez' future care would be consistent with her maintenance care over the last few years. Specifically, Florez' first two years of care were more expensive because of costs related to the testing and diagnosing of her condition but, following that initial two years, Florez had reached medical stability. Upon reaching medical stability, Florez' medical care became maintenance care that would continue indefinitely. (R. 909 at 185:4-186:12; R. 910 at 449:5-11) Florez' maintenance care involved itemized costs for periodic doctor visits, audiological therapy, and medications. (R. Plaintiff's Exhibit 117) Based on the evidence, counsel's closing included arguments for assessing future damages consistent with the maintenance care Florez had been receiving at the direction of Dr. Amann and Dr. Siddoway since 2006. (R. 911 at 650:8-665:25)

6. Jury Instruction on Pre-Existing Condition

Schindler claims Florez failed to establish she had a pre-existing BPPV condition. (Schindler's Brief at 8, ¶ 2) This is accurate. Florez did not introduce evidence of a pre-

existing condition. At trial, Florez maintained her BPPV was a result of the 2004 incident and was not pre-existing. Yet, Schindler omits that *Schindler* asserted Florez' BPPV pre-existed the elevator incident. (Schindler's Brief at 45-47)

Schindler's primary defense was that Florez had not been injured. Schindler's secondary defense was that even if the jury found Florez had been injured, Florez' BPPV was pre-existing. (R. 908 at 55:2-6; 58-63; 64:2-12) With Schindler's defense, the trial court believed it appropriate to instruct the jury on how to determine damages, if any, in light of a pre-existing condition. (R. 910 at 559:6 - 601:17)

7. Opening & Closing Arguments

Schindler asserts a variety of allegations on appeal based on counsel's comments during opening and closing. Schindler's approach to counsel's arguments, mirrors their attack on Florez' BPPV. Schindler abstracts miscellaneous comments, without reference to context, to create an alleged condition of prejudice against Schindler. This condition simply did not exist. The record, including the insurmountable fact that Schindler did not object to the comments now cited on appeal, demonstrates there was no prejudicial attack levied against Schindler because of their corporate status or size.

On the contrary, this was a case where Schindler had insufficient evidence and thus, choose to attack the credibility of Florez, witnesses, and counsel. Counsel's comments were made in defense to Schindler's trial tactic of bullying every witness, medical provider, and

counsel.[5] The trial court's ruling best illustrates the accurate condition at trial. In rejecting Schindler's request for a new trial, Judge West ruled:

> "[T]his was a hard fought, hotly contested, jury trial. Emotions did run high. A lot was at stake. Although the Court does not completely condone some of the comments made by the Plaintiff's attorney during closing argument, taken as a whole and in context, those comments did not rise to the level of invoking the passion and prejudice of the jury. The juries' verdict appears well thought out, rational, and not the result of passion or prejudice. It was not a 'runaway' jury. It was not an excessive verdict. The verdict was well within the discretion and prerogative of the jury" (R. at 0853, ¶ 2)

In addition to arguing there were multiple offensive comments without any specificity, Schindler cites to two, specific, instances that allegedly warrant a new trial. First,

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[5]Since Schindler hadn't contacted anyone, Schindler suggested Mr. Ward spoke to witnesses improperly, manipulating testimony in conspiracy against Schindler (R. 911 at 676:23-677:4; R. 910 at 451:3-10), arguing " Mr. Ward came in with his preconceived story and he tried to get these witnesses to fit within his preconceived story". (R. 911 at 678:2-3)

Schindler's exhibit represented Florez was seen by Dr. Siddoway in 2003 for BPPV, less than a year before the elevator incident, even though Schindler knew there was no medical record for that date. After Dr. Siddoway testified under oath that there was no record because there was no such visit, Schindler suggested Dr. Siddoway was lying, i.e. hiding the record. (R. 911 at 675:21-676:3; 676:23-677:4) Notably, Dr. Siddoway was not hired by Florez and did not want to testify at trial; Dr. Siddoway had to be subpoenaed. Schindler's attack against Dr. Siddoway demonstrates why treating physicians are unwilling to provide relevant testimony.

Schindler questioned where the overhead projector went and said Florez' counsel "took it away" because, Mr. Ward "doesn't want you to look at the evidence". (R.911 at 674:8-9; R. 911 at 674:21-22)

Schindler was so adversarial and contentious at trial that counsel objected over 75 times and to things such as Mr. Ward's reference to a record as "9" of 2004, instead of "September" of 2004 (R. 910 at 432:19-433:8) and Mr. Ward referencing records without first making sure he explained where that record was in *Schindler's* exhibit (R. 910 at 428:3-429:18; R. 910 at 432:1-16). Yet, notably, Schindler did not object to the comments now claimed prejudicial, demonstrating the benign tone and insignificance of these comments at trial.

Schindler asserts counsel's arguments erroneously instructed the jury that Florez had a 25 year life expectancy. (Schindler's Brief at 23, No. 76) The record does not support Schindler's assertion. During closing, counsel conducted a demonstration on calculating future medical expenses based on the doctors testimony and the summaries of past medical expenses. As part of this demonstration, counsel needed to use a figure for sake of argument but, it was made clear that counsel was not relying on any evidence:

> "Now, then the question becomes, well, how long is Connie's future? *No one knows . . . Nobody knows,* so you know, as I've looked and thought about it and looked at the average side of this, we figured a fair thing was 25 years. She's 58 now, that would make her about 83. . .and by the way, ***you're not bound by this*** *... If you think, "I don't think she'll live more than 20 years", you can do that . . .* I mean, *we don't claim we have a crystal ball.* We're just trying to be fair." (R. 911 at 663:2-14)(emphasis added)

Counsel did not misrepresent there had been medical evidence that Florez would live an additional 25 years. Moreover, Schindler did not object to the above comment at trial.

Second, Schindler states on appeal that Florez' counsel misrepresented the law to the jury during closing arguments. (Schindler's Brief at 49) The record, including the context of the comments, demonstrate this did not occur.

During closing, Schindler's counsel attacked the credibility of Dr. Siddoway. (R. 911 at 675:21-676:3; 676:23-677:4) In response, Florez' counsel stated "So what that he doesn't agree with Dr. Siddoway? That doesn't mean anything, folks. Don't let yourself be swayed by that kind of nonsense. He had an obligation to bring in a doctor to say Dr. Siddoway is wrong and he didn't. He just didn't." (R. 911 at 709:17-22)

Schindler objected, informing the court that Florez' counsel had just testified that Schindler had a legal obligation to bring in medical witnesses. Florez' counsel responded by indicating he was referring to a substantive obligation, he did not represent it was a "legal" obligation. In front of the jury, Schindler convinced the court that Florez' counsel had, indeed, stated "legal" obligation. To avoid more useless bickering, and out of respect for the trial court, Florez' counsel took the blame. Counsel turned to the jury and stated " I take it back. He doesn't have a legal obligation to bring anybody in." The record accurately reflects counsel did not state Schindler had a "legal" obligation to bring in a doctor to refute Dr. Siddoway. (R. 911 at 709:18-710:14)

SUMMARY OF THE ARGUMENT

Schindler presents four issues on appeal.

Summary Judgment: Schindler contends the trial court erred in denying its motion for summary judgment. However, summary judgment may only be granted where the moving party demonstrates that no genuine issues of material fact remain. Schindler argued summary judgment by presenting an alternative theory of causation, yet failing to provide any evidence or expert testimony which could support its theory. Schindler's sole authority used to demonstrate 'no genuine issue of material fact' consisted of citing a website, www.howstuffworks.com. Even accepting their theory has plausibility in the absence of evidence and testimony, the argument cannot demonstrate the absence of genuine material fact, precluding summary judgment. Namely, Schindler claimed that the nitroglycerin pills

caused Connie to faint and, therefore, caused the head injury. Schindler's argument ignores the fact that being trapped in the elevator caused Connie to ingest the nitroglycerin pills.

Schindler also suggests that Florez' BPPV was not caused by the fall and points to a large number of pre-fall vertigo incidents. Although BPPV induces vertigo, the mechanism is significantly different from that which caused Connie's prior episodes. BPPV induces vertigo through the inner ear and the mechanism of inducement was diagnosed in Florez and supported by medical testimony. Simply by showing the instances of prior episodes and attacking the credibility of the medical witnesses, Schindler argued no genuine issues remained regarding causation of the BPPV. Schindler's attack, however, failed to demonstrate no genuine issues of material fact remained and, more importantly, it also failed to convince the jury on this theory as well.

Florez Affidavit: Schindler suggests the trial court erred in not striking Florez' affidavit. Because Florez' affidavit was based on personal knowledge and merely recited the sequence of events as they occurred, the trial court did not abuse its discretion in refusing to strike the affidavit. Additionally, refusing to strike the affidavit does not create grounds for reversal where other competent evidence prevented summary judgment

Dr. Morgan as Expert Witness: Dr. Morgan's extensive experience as an independent medical exam reviewer for workers compensation, his training and background all demonstrate his ability to review, summarize and offer opinions and conclusions regarding the need for medical intervention and the cause of injury. The trial court did not abuse its considerable and wide discretion in admitting Dr. Morgan as an expert.

Motion for New Trial/Judgment Notwithstanding the Verdict: In order to overturn a denial of a motion for new trial or judgment notwithstanding the verdict, the appealing party must marshal all the evidence and demonstrate how, taking all facts and inferences in a light most favorable to the other side, the wrong result was nonetheless reached. Schindler does not marshal the evidence and demonstrate how the outcome is outside the bounds of reason.

ISSUE I BECAUSE SCHINDLER FAILED TO SHOW FLOREZ' INJURIES WERE *NOT* CAUSED BY THEIR NEGLIGENCE, THE TRIAL COURT PROPERLY DENIED SUMMARY JUDGMENT

The party moving for summary judgment bears the burden of demonstrating that no genuine issues of material fact remain. "Unless the moving party meets its initial burden to present evidence establishing that no genuine issue of material fact exists, the party opposing the motion is under no obligation to demonstrate that there is a genuine issue for trial." *Harline v. Barker*, 912 P.2d 433, 445 (Utah 1996) (citation omitted). "Utah law does not allow a summary judgment movant to merely point out a *lack* of evidence in the nonmoving party's case, but instead requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact." *Orvis v. Johnson*, 2008 UT 2, ¶ 15, 177 P.3d 600 (emphasis added).

Schindler's motion for summary judgment first argued the heart medication caused Connie Florez to faint. Being trapped in the Schindler elevator necessitated taking the heart medication in the first instance. Further, Schindler's attempt to prove that the heart medication caused Connie to faint, rather than the heat and anxiety of being trapped in the

elevator, consisted of citing a single article taken from an internet website, "www.howstuffworks.com." (R. 101). This Court should disregard and give no consideration to Schindler's authority because it is inadmissible evidence lacking in foundation and entirely hearsay unsupported by any medical opinion and, therefore, incapable of supporting a motion for summary judgment. *See D&L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989) ("It is true that inadmissible evidence cannot be considered in ruling on a motion for summary judgment.").

Although argument regarding the admissibility of an internet article was not raised below, this Court may affirm the lower court's denial of summary judgment on any basis which it finds legally viable. An "appellate court will affirm the judgment . . . appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court . . . [and] even though such ground or theory . . . was not raised in the lower court, and was not considered or passed on by the lower court." *State v. Montoya*, 937 P.2d 145, 149 (Utah Ct. App. 1997). Because an internet website, www.howstuffworks.com, is neither authoritative nor admissible evidence, Schindler's argument for overturning denial of summary judgment must be refused.

Further, citing a single website as authority for the proposition that *this* plaintiff fell because of nitroglycerin and not because of the fear, anxiety and heat exposure strains credibility and cannot demonstrate that no genuine issues of material fact remain. "[B]ecause negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, summary judgment is appropriate in negligence cases only

in the clearest instances." *Sandberg v. Lehman, Jensen & Donahue, L.C.*, 2003 UT App 272, ¶ 5, 76 P.3d 699. Indeed, the 'howstuffworks' web article, at best, suggests that the heart medication "may" cause 'dizziness [or] lightheadedness.' (R. 102). Because Schindler did not prove that Florez fainted from the heart medication, Florez was not even obligated to respond to the argument with competing evidence. Accordingly, the trial court correctly denied summary judgment on this argument even in the absence of a response from Florez.

Additionally, Florez' affidavit provided disputed facts that she never previously experienced a fainting episode associated with taking her heart medication. Florez' affidavit affirmatively generates a genuine issue of material fact in the face of literature stating that the medication "may" cause dizziness. In other words, the medication doesn't cause fainting in everyone, all the time and, in Connie's experience, it had not caused fainting in her at any time. All inferences from the presented facts must be taken in favor of the non-moving party. *See 3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co.*, 2005 UT App 307, ¶ 1 n. 2, 117 P. 3d 1082 ("we review the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party"). Taking all inferences regarding these facts in favor of Florez, the trial court correctly denied summary judgment.

Second, Schindler argued that Florez' prior episodes of vertigo showed that her present vertigo was not caused by their negligence. However, the argument ignores the distinction between Florez' prior transitory episodes of vertigo and those caused by BPPV, a permanent condition brought on by inner ear mechanisms. Schindler offered no medical testimony, or competent admissible evidence, to back up their theory for summary judgment.

In effect, Schindler provided only an alternative basis for the vertigo but, did not prove that the present injury was solely a preexisting condition. At best, Schindler's motion presented an alternative theory of causation, but did not meet their burden of demonstrating no material fact remained on the issue of causation. Accordingly, the trial court properly denied the motion for summary judgment.

Causation, including proximate cause, cannot typically be resolved on motion for summary judgment and remains within the unique province of the jury's fact finding mission. "This very dispute [on the issue of causation] creates an issue of fact within the province of the jury." *Nay v. General Motors Corp.*, 850 P.2d 1260, 1264 (Utah 1993). ("[D]oubts about whether a nonmovant has established a genuine issue of material fact should be resolved in favor of permitting the party to go to trial"); *Butterfield v. Okubo*, 831 P.2d 97, 104 (Utah 1992) *citing Rees v. Albertson's Inc.*, 587 P.2d 130, 133 (Utah 1978). Here, assuming *arguendo*, that Schindler has proven something other than its negligence caused Florez' BPPV, Florez presented more than adequate evidence to require the matter be submitted to the jury.

Schindler relies on *Clark v. Farmers Ins Exchange,* 893 P.2d 598 (Utah App. 1995) to assert Florez had a higher burden on causation than merely demonstrating a material factual dispute. Schindler's reliance is misplaced. First, unlike *Clark*, Florez presents medical evidence of causation through Dr. Morgan. Second, *Clark* is easily distinguishable in that no one, including Clark, knew how Clark had been hurt. *Id.* at 601. Here, Florez provides deposition testimony, medical records, and a Rule 59(e) affidavit explaining how she was injured. At trial, five eye witnesses confirmed Florez' description of events. Further, Dr.

Morgan assigned Florez a 4% permanent impairment due to the BPPV as a result of the elevator incident.

With the introduction of Dr. Morgan's permanent impairment rating, Schindler's request for summary disposition should fail. Schindler's appeal either omits Florez' permanent impairment or, mentions it in an effort to discredit the evaluator, Dr. Morgan. Schindler omits Dr. Morgan's causation opinion because Dr. Morgan does not use the word, "causation", in his expert report. In opining on Florez' BPPV, Dr. Morgan uses the term "related to the 2004 elevator incident" rather than "caused by the 2004 incident". Schindler also omits Dr. Morgan's deposition testimony, wherein he clarified that when he used the term "related to" in his report, he was referring to "causation". (R. 0399 at pg. 13, ln 21-24). Although Dr. Morgan had not yet been deposed at the time Schindler filed its motion for summary judgment, despite a pending scheduling order that allowed for more than five months of expert discovery, an expert's use of the term "related to" has been found to be sufficient evidence of causation to defeat a motion for summary judgment.

The Third Circuit Court of Appeals reviewed the phrase "related to" in *Redland Soccer Club, Inc. v. Department of Army*, 55 F.3d 827,852 (3rd Cir.1995). The Third Circuit Court of Appeals found it error to grant summary judgment on causation when the doctor's statement was that the [plaintiff's] illnesses were "related to" defendant's negligence. (Id. at 851). The Third Circuit Court of Appeals indicated that ". . .causation does not require that expert testimony include any 'magic words' such as 'caused by,' rather than 'related to.'" *Redland* at 853. The Third Circuit further reiterated "expert medical

opinion on causation need not be unqualified and absolute, i.e., stated in 'categorical terms'; citing *Gradel v. Inouye*, 421 A.2d 674 (Pa. 1980).

In a footnote, the *Redland* court recognized that evidence presented at the time of a motion for summary judgment may not always be definitive on an issue, stating, "[o]f course, if it could be shown, by cross-examination or otherwise, that [plaintiff's doctor] used the term "relation" to mean "correlation" in the statical sense instead of cause in either the medical or legal sense, the force of his testimony could be significantly affected." *Redland* at N. 16. Still, it was unequivocal that "for summary judgment purposes, however, we believe that the [plaintiffs] have introduced sufficient evidence to establish a genuine issue of material fact regarding causation." *Id.* at 852.

Utah courts similarly conclude that "magic words" are not needed to effectuate legal principles. *See*, *Rinderknecht v. Luck*, 965 P.2d 564, 566 (Utah App. 1998) (finding "magic words' don't equate to binding contract); *Matter of Estate of Burgess,* 836 P.2d 1386, 1395 (Utah App. 1992) (holding Utah code's approach is to eliminate unnecessary, ritualistic formality and "magic words"); *State v. Dunkel*, 2006 UT App 339, ¶ 14, 143 P.3d 290 (withdrawal of consent to search need not be effectuated through 'magic words' (citing *U.S. v. Gray,* 369 F.3d 1024, 1026 (8th Cir. 2004)); *Embassy Group, Inc. v. Hatch,* 865 P.2d 1366, 1370 (Utah App. 1993) (trial court did not need to use "magic words" in its finding); *Valcarce v. Fitzgerald,* 961 P.2d 305, 316 (Utah 1998) (in a bad faith case, trial court was not expressly required to use "magic words of bad faith" in determining applicability of Utah code provision).

At a very minimum, causation could be inferred from Dr. Morgan's report. Causation can be inferred with the purpose of viewing the facts in the light most favorable to the non-moving party on summary judgment. *See Butterfield v. Okubo* 831 P.2d 97 (Utah 1992); *Kilpatrick v. Wiley, Rein & Fielding* 909 P.2d 1283 (Utah 1996). Even though at the summary judgment stage "plaintiff's causation theory may appear somewhat strained, it is the province of the jury . . . to determine whether the causation theory is fatally attenuated." *Id.* at 1292 (citation omitted).

Finally, credibility judgments and argument regarding the weight of the evidence cannot provide a basis on which to grant summary judgment. "It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence." *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283, 1292 (Utah App. 1996). Contrary to this clear requirement, Schindler improperly relies on weighing Florez' expert tesimony and report to request summary judgment.

When the facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to Florez, the trial court correctly denied summary judgment and Schindler provides no basis on which this Court could find an error needing correction by reversal.

ISSUE II THE COURT CORRECTLY DENIED SCHINDLER'S REQUEST TO STRIKE FLOREZ' AFFIDAVIT

The review of affidavits is a "highly fact-dependent question," granting the trial court broad discretion in determining whether the affidavit was correctly based on Florez's personal knowledge. *Superior Receivable Services v. Pett,* 2008 UT App 225, ¶ 10, 191 P.3d 31 (upholding trial court's denial of motion to strike affidavit finding that plaintiff's statements

were not opinion, rather based on her personal knowledge and memory which would be admissible at trial); *See Brown v. Jorgensen,* 2008 UT App 225, ¶ 21,136 P.3d 1252 (although defendant's affidavit contained inadmissible hearsay (properly disregarded by the trial court) the affidavit also contained statements based on defendant's personal knowledge, thus did not violate Rule 56(e)).

Florez' affidavit, in summary and relevant to the issues raised by Schindler on appeal, stated she suffered an "anxiety attack which caused significant emotional and physical distress" while trapped in the elevator. (R. 179). Florez further related her experience that, because of this distress, "I fainted when the doors were pried open and I was assisted from the elevator car . . . I fell to the floor on my left side and my head hit the floor hard." (R. 0180). Additionally, Florez stated that following the incident she "suffered significant vertigo and dizziness after the fall, which has continued to the present." (Id.). Florez' statements are based on her personal knowledge of what she experienced when exiting the elevator, and what she continued to experience including the vertigo and dizziness after the fall.

Although some of the language in the affidavit contained statements which might be colored as 'medical' and 'causation' by Schindler, this alone does not provide a basis on which to strike the statements.[6] In reviewing Connie's affidavit, the trial court indicated that "There's no question that some of this is her opinion and it didn't seem to me that her opinion was that out of line." (R. 907 at 14:5-7) Florez was describing what she experienced, in a sequential manner, as would any person describing events in their life. The fact that

[6]In the trial court below, Schindler also contended that Florez' affidavit 'contradicted' her prior deposition testimony and the affidavit should have been stricken on that basis as well. (R. 0220). Schindler abandons that argument on appeal.

Florez' description of her injuries may have utilized medical terms does not equate to her attempting to offer medical testimony. All medical evidence was offered through Dr. Morgan's report and the introduction of admissible medical records. (R. 0183-217) Florez' affidavit simply described what she felt and experienced when she fainted after exiting the elevator.

Additionally, the case authority relied upon by Schindler fails to support striking the affidavit. Schindler cites *Beard v. K-Mart Corp.*, 2000 UT App 285, ¶ 15, 12 P.3d 1015 as support for the proposition that "a lay person cannot offer testimony regarding medical conditions, causation, diagnoses or treatment." (Schindler's Brief p. 32). However, *Beard* expressly allowed such causation lay testimony and excluded lay testimony from its holding. "In this case, the question is not whether the accident at K-Mart caused Beard injury, but rather whether injuries sustained as a result of the accident at K-Mart required the neurological surgeries." *Id* at 1019. Schindler does not contend on appeal that Florez lacked expert witness testimony establishing the need for her treatment.

More importantly, *Beard* went on to hold it is entirely permissible for a plaintiff to offer testimony regarding the cause of their injury and pain. "Beard was properly permitted to testify that the accident in the store caused pain and injury. The question as to whether such pain and injury resulted from the blow is within the common knowledge and experience of lay witnesses." *Id.* at 1019.

Indeed, it is common knowledge that people faint in response to traumatic or frightening events as demonstrated by individuals who pass out when they have blood drawn, or the somewhat pejorative stereotype of the housewife who passes out at the sight of a mouse. For Florez to relate via affidavit her experience that she passed out after experiencing the trauma and fear of being trapped in a hot elevator for over an hour goes beyond nothing in the common everyday understanding of our world. Schindler presents no facts or authority to show that the trial court abused its discretion in refusing to strike Florez' affidavit and this Court should refuse to overturn that decision.

ISSUE III SCHINDLER DEMONSTRATES NO ABUSE OF DISCRETION IN PERMITTING DR. MORGAN TO TESTIFY.

Schindler suggests that Dr. Morgan should have been prevented from testifying as an expert on two bases: (1) Dr. Morgan's expert report allegedly lacked any mention of 'causation' and Dr. Morgan should have, therefore, been prevented from testifying regarding causation; and, (2) Dr. Morgan lacked the area of expertise necessary to testify regarding causation. Absent an abuse of discretion, appellate courts will not reverse the trial court's decision to allow an expert witness to testify. "The determination as to who qualifies as an expert witness and the admissibility of the witness's testimony falls within the discretion of the trial court. Absent a clear abuse of this discretion, we will not reverse the trial court's determination." *Evans ex rel. Evans v. Langston*, 2007 UT App 240, ¶ 6, 166 P.3d 621. Neither of Schindler's arguments demonstrate a clear abuse of discretion in allowing Schindler to testify.

1. The Trial Court Properly Found Schindler Had Notice of Dr. Morgan's Causation Opinion

Schindler acknowledges the "purpose of an expert report is to 'give the opposing party adequate notice to prepare to meet the testimony.'" (Schindler's Brief at 34). Schindler asserts it did not receive notice that Florez intended to offer causation through Dr. Morgan. However, the record demonstrates Schindler had notice, but sought to impose a strained linguistic interpretation of Dr. Morgan's expert report.

First, Schindler had unqualified notice through Florez' opposition to Schindler's motion for summary judgment. Moreover, any question regarding Dr. Morgan's causation opinion was quickly answered via Dr. Morgan's deposition, wherein he unequivocally stated that "I have causation right here. It's due to the elevator accident." (R. 0399 16:13-14)

At the hearing on Schindler's motion in limine, the trial court thoughtfully reviewed Dr. Morgan's report and made a record of the appropriate paragraphs on causation before ruling Dr. Morgan was allowed to testify on causation. (Addendum B at 24:20 -25:4;32:18-33:15) Despite this clear ruling on Schindler's motion in limine, Schindler repeated the same notice objections at trial, (R. 375:13-379:15; R. 380:9-18; R. 385:6-13) prompting the trial court to remind Schindler:

> " I really don't have problems with the fact that either side in this case has received notice of issues. This goes to the heart of my disagreement with Mr. Lilja [Schindler's counsel] on the reading the report from the one doctor. I think he was absolutely put on notice. Could this report have been written better and could have had more specificity when we're talking about the muscle/skeletal things? Yes. But I really think he was put on notice and he knew that that's what the doctor's opinion is going to be. I don't have any doubt your gave him notice about these things." (R. 908 at 589:9-18)

2. It Was Within the Trial Court's Discretion to Find Dr. Morgan Competent to Testify on Causation

Schindler completely ignores Florez' presentation of Dr. Morgan's proper testimony under Rule 702 and 703 of the Utah Rules of Evidence. (R. 0421-0426). Instead, Schindler argues the court exceeded its wide discretion in this case because Dr. Morgan relies on an underlying diagnosis made by an ENT. Consistent with the Rules of Evidence, Utah courts recognize that an expert witness may rely upon the testimony and other records of evidence in reaching their opinions. In *Lamb v. Bangart*, 525 P.2d 602, 607 (Utah 1974), the expert "testified that his opinion was based on the testimony he had heard and the records in evidence." The defendant moved to exclude the expert's testimony because he relied on the testimony of other witnesses and other records. The court refused to strike or exclude the expert holding that such a "challenge to the reliability of such expert testimony will be considered as not involving its competency but its weight and credibility, which is a matter for the jury to determine." *Id.* at 608.

Consistently, the trial court found:

> "if Dr. Siddoway takes the stand and testified that he did a diagnosis . . . And then Dr. Morgan takes the stand and says, I relied up Dr. Siddoway's diagnosis to conclude [causation] . . . then I don't see why that testimony's not admissible. You can always attack Dr. Siddoway for the prognosis or the diagnosis in the first place. You can always attack Dr. Morgan for relying upon it . . . But is seems to me the doctors are testifying on two different issues, but they are entitled to rely upon each other's diagnosis." (Addendum B at 13:14-14:11)

Federal Notes of the Advisory Committee corroborate the trial court's decision:

> [a] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays . . . His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. *Notes of the Advisory Committee on Rule 703*

Because of Dr. Morgan's reliance upon Dr. Siddoway, Schindler concludes Dr. Morgan's testimony is outside of his expertise. This deduction is a fallacy. Causation *is* Dr. Morgan's expertise. Dr. Morgan testified how, as a doctor who rehabilitates injuries, a large part of his training and speciality is in performing causation evaluations; he conducts these examinations on weekly basis. Dr. Morgan admitted that although he had not offered a causation opinion on BPPV at trial before, he does treat patients who suffer from this injury. Dr. Morgan also testified that in addition to relying upon the ENTs, his record review and his examination, he "boned up" on medical research into the causes of BPPV before offering his opinion. (R. 910 at 408:2-410:12)

Schindler erroneously relies on medical malpractice cases for the assertion that a board certified physiatrist cannot testify to causation of BPPV. (Schindler's Brief at 35-37) However, the cases relied upon stand for the proposition that one expert witness, *in a medical malpractice case*, may not testify as to the *standard of care* to be used by a medical professional in a different specialty. Standard of care is not at issue in this case.

Similarly, Schindler cities to a series of extra-jurisdictional cases that are factually inapplicable by abstracting isolated quotes from the cases to imply the cases are consistent

with Schindler's position. A closer look at these cases demonstrate they are dissimilar and unsupportive to Schindler's plight.[7]

Applicable case law indicates that "an expert witness is not strictly confined to his area of practice, but may testify concerning related applications; lack of specialization does not affect the admissibility of the opinion, but only its weight." *Wheeler v. John Deere Co,* 935 F. 2d 1090, 1101 (10th Cir. 1991) (finding psychiatrist could offer a human factors opinion on the design of a product). Similarly, it has been found to be an abuse of discretion to restrict or exclude expert testimony based upon the lack of a particular, or preferred speciality. *See, Holbrook v. Lykes Bros. Steamship Co.,* 80 F.3d 777, 782 (3rd Cir. 1996) (finding it error to exclude internist's testimony on whether radiation can cause alleged injury simply because doctor was not an oncologist who may have more experience with radiation; also affirming court's finding that doctors' testimony based solely on review of plaintiff's history and medical literature was sufficient to satisfy Daubert *Id.* at 785.); *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 856 (3rd Cir. 1990) ("The district court's insistence on a certain kind of degree or background is inconsistent with our jurisprudence in this area. The language of

[7]*Benison v. Silverman*, 233 Ill. App. 689, 698 (Ill. Ct. App. 5th Dist. 1992) dealt with standard of care in medical malpractice; *Perez v. City of Austin,* 2008 U.S. Dist. LEXIS 36776 (W. Dist. Texas May 5, 2008) found a psychologist didn't need prior experience or specific expertise in "police psychology" to render expert psychological opinion in a police case; *Davison v. Indus. Claim Appeals Office,* 84 P.3d 1023, 1026 (Colo. 2004) upheld, under Colorado statute, you must have a medical or psychological expert to assert "mental trauma"; *Wintz v. Northrop Corp.,* 110 F.3d 508, 513 (7th Cir. 1997) upheld the district court's discretion in determining proposed expert did not meet Federal *Daubert* qualifications; *Cromer v. Mulkey Enters.,* 254 Ga. App. 388 (Ga. Ct. App. 2002) prevented a biomechanist from exceeding his limited role by offering medical testimony; *Sinkfield v. Oh,* 229 Ga. App. 883, 886 (Ga. Ct. App. 1997) found it error to exclude Pharmacist's testimony regarding the effects of Motrin 800 in a pregnancy simply because he was not of the same medical speciality as the Obstetricians.

Rule 702 and the accompanying advisory committee notes make clear that various kinds of knowledge, skill, experience, training, or education, qualify an expert as such . . . In light of the liberal Rule 702 expert qualification standard, we hold that the district court abused its discretion by excluding [medical] testimony simply because the experts did not have the degree or training which the district court apparently thought would be most appropriate.")

Schindler does not attack Dr. Morgan's legitimate qualifications and experience in determining causation but rather, relies on its assertion that Dr. Morgan isn't the best qualified to render causation in this case because he relied upon the diagnosis of Dr. Siddoway. The trial court was within its discretion to deny Schindler's Motion to exclude Dr. Morgan and allow Schindler to liberally attack the weight of Dr. Morgan's, and Dr. Siddoway's, testimony at trial.

ISSUE IV WHEN VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO FLOREZ, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT.

1. Schindler Does Not Meet the Legal Requirements for Obtaining a New Trial

Reviewing appellate courts sustain the denial of a motion for new trial if there is simply *an* evidentiary basis for the jury's decision. "Where the trial court has *denied* the motion for new trial, its decision will be sustained on appeal if there was an evidentiary basis for the jury's decision." *Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1982). Indeed, reversal of a denied motion for new trial only occurs if the moving party can show "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." *Id.* at 732.

In order to meet this burden, the party seeking to challenge denial of a motion for new trial or judgment notwithstanding the verdict carries a very high burden. The decision of the trial court will only be reversed if "viewing the evidence in the light most favorable to the prevailing party, we conclude that the evidence is insufficient to support the verdict." *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992). Moreover, it is Appellant Schindler's obligation and burden to "marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *Id.* at 839. Here, the bulk of Schindler's attack amounts to insufficiency of the evidence. Yet, Schindler wholly fails to marshal all evidence and demonstrate a deficiency so great as to warrant setting the verdict aside on appeal.

Schindler omits Rule 61 of the Utah Rules of Civil Procedure as a determinative provision in ordering a new trial. (Schindler's Brief at 3-5). Rule 61 dictates that Schindler must demonstrate that there was not only error by the trial court but that the error was "substantial" or "prejudicial." New trials are denied unless it is reasonably clear that prejudicial error tainted the proceedings or substantial justice was not achieved. *Davis v. Grand County Service Area,* 905 P.2d 888, 890 (Utah 1995).

Schindler failed to show any alleged error was substantial or prejudicial, warranting a new trial.[8] Two district court judges found the facts and law warranted a jury determining whether Schindler was responsible for the injuries Florez received. Although Florez adamantly maintains no error occurred, any error would nonetheless, need to be deemed harmless. Morever, by examining each allegation of error, it is shown Schindler can't

[8]Schindler also does not allege plain error. Any argument of plain error is waived.

establish error because of its failure to properly marshal the evidence under any of its four (4) arguments for obtaining a new trial:

A. The BPPV Evidence Was Sufficient to Support the Verdict

Schindler asserts there was insufficient evidence of Florez' BPPV to support the verdict. Schindler lumps this argument with the court's review of Schindler's motion in limine to exclude Dr. Morgan. Schindler improperly piggybacks its arguments, i.e., if Dr. Morgan hadn't testified, there would be no BPPV causation evidence, hence the court should find there was insufficient evidence to support the verdict. These arguments can not be intertwined. Since the trial court found Dr. Morgan competent to testify on causation, his opinion must be marshaled when reviewing the sufficiency of the evidence submitted to the jury. As Schindler failed to properly marshal the evidence by excluding consideration of Dr. Morgan's opinion, Schindler's assertion that there was a lack of evidence to support the jury's verdict should fail. *See Child v. Gonda*, 972 P.2d 425 (Utah 1998) (holding "the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.") *Id.* at 433, citing *McCorvey v. State Dep't Of Transp.*, 868 P.2d 41, 44 (Utah 1993).

In making its determination, the jury heard Dr. Morgan's expert opinion that Florez' BPPV was caused by the elevator incident; no medical expert contradicted this opinion. The jury was also provided Florez' extensive medical history, with the fierce cross-examination of Dr. Morgan and Dr. Siddoway based on this medical history. With Dr. Morgan's opinion on causation, and Dr. Siddoway's opinion and first hand explanation of Florez' prior

complaints of dizziness, there was sufficient evidence for the jury to determine Florez' BPPV was caused by the elevator incident.

B. Evidence of Florez' Damages Was Sufficient to Support the Verdict

In failing to marshal the evidence on damages, Schindler inaccurately represents Florez provided no evidence of damages. (Schindler's Brief at 43, ¶2) Schindler ignores the testimony from the fact witnesses, three medical providers, Florez, and the multiple medical expense summaries. After the jury's determination of causation, Schindler's medical expense summaries, alone, were enough evidence to justify the amount of damages awarded by the jury. See *Pettus v. Gottfried,* 606 S.E. 2d 819 at 825 (Va. 2005) reinforcing, "[t]he general rule is that when a party unsuccessfully objects to evidence that he consider s improper but introduces on his own behalf evidence of the same character, he waives his objection to the other party's use of that evidence." Citing *Combs v. Norfolk & Western Ry. Co*, 507 S.E. 2d 355, 360 (Va. 1998), *Hubbard v. Commonwealth*, 413 S.E. 2d 875, 879 (1992), and *Whitten v. McClelland*, 120 S.E. 146, 150 (Va. 1923).

Price-Orem v. Rollins, 784 P.2d 475 (Utah 1989), relied upon by Schindler, supports upholding the jury's verdict. In *Price-Orem*, the plaintiff had significantly less proof of damages than Florez and the jury verdict was upheld based on well established Utah precedent that the evidence of the amount of damages suffered involves a lower evidentiary standard than the evidence needed to establish there was a loss. *Id.* at 479. In *Price-Orem,* the plaintiff had no evidence of any "actual" losses, compared to Florez who demonstrated the amounts of her actual loses via multiple medical expense summaries. The Court indicated

that "the amount of damages may be based upon approximations, if the fact of damages is established, and the approximations are based upon reasonable assumptions or projections." *Id.* at 479.

Florez presented actual expenses incurred; amounts that had been reviewed and were testified to be reasonable and customary charges within the community. Based on these actual damages incurred, coupled with the medical experts' testimony that the future damages would be consistent with the past few years of care, Florez' counsel properly argued approximate future damages.

Schindler takes umbrage with Florez' reference to certain anti-inflammatory medications when approximating future damage. The need for anti-inflammatory medications was discussed during Dr. Amann's testimony. (R. 909 at 185) Schindler failed to object to counsel's reference to the wrong brand name of the anti-inflammatory during closing argument. (R. 911 at 662:10-23) Schindler cites no record for preserving this alleged error. (Schindler's Brief at 43 - 44). Accordingly, the objection is waived.

The jury was fully aware counsel was making estimates on future medications and the jury's role was to make its own calculations, based on the evidence. (R. 911 at 665) The demonstrative calculations made by Florez' counsel during closing were not provided to the jury for their deliberations. The jury's independent determination of damages, without adopting the amount argued by Florez or Schindler in closing arguments, demonstrates there was no prejudice to Schindler. In making their independent determination, the jury was left with both parties' medical expense summaries and the medical testimony that the future costs

would be similar to the costs Florez incurred over the last few years.

C. Based on Schindler's Defense That Florez Suffered BPPV Prior to the Elevator Incident, the Trial Court Properly Instructed the Jury How to Allocate Damages if They Found Florez Had a Pre-Existing Condition

Schindler asserts error for admission of jury instruction No. 28. (R. 0625) (Incorrectly referenced as R. 0628 in Schindler's Brief at 46). Whether a trial court properly instructed the jury is a question of law, which the appellate court will review for correctness. *Robinson v. All-Star Delivery, Inc.,* 1999 UT 109, ¶ 9; 992 P.2d 969; *Child v. Gonda,* 972 P.2d 425, 429 (Utah 1998).

Schindler suggests the trial court's instruction No. 28 was not a MUJI form instruction. (Schindler's Brief at 46, ¶2) However, jury instruction No. 28 is an exact replica of MUJI 2nd CV2018. Schindler further asserts that Instruction No. 28 "misstates the law". In actuality, MUJI 2nd CV2018 is derived from Utah law housed in *Robinson v. All-Star Delivery, Inc.,* 1999 UT 109, ¶ 11, 992 P.2d 969 (Utah 1999), *Tingey v. Christensen*, 1999 UT 689, ¶ 14, 987 P.2d 588 (Utah 1999), and *Brunson v. Strong*, 17 Utah 2d 364, 412 P.2d 451 (Utah 1966). Schindler fails to cite any legal authority which contradicts the above authority relied upon in creating the MUJI form instruction.

Further, Schindler offered no alternative instruction on pre-existing conditions. "Under Utah law, objections must be raised with sufficient specificity at trial for the trial judge to have a legal basis for altering or rejecting the instruction . . . [the] objection must be sufficiently precise so as to alert the trial court to all claimed errors and to give the judge an opportunity to make corrections to the instructions before the jury retires." *Jones v. Cyprus*

Plateau Min. Corp., 944 P.2d 357, 359 (Utah 1997) (refusing to consider on appeal because the party neither requested an alternative instruction nor asked the court to reword its instruction). Schindler offers nothing in the record to demonstrate it accurately preserved its objection to the pre-existing instruction that would have allowed the trial court an opportunity for correction prior to the jury retiring for deliberations.[9]

Where Schindler portrayed Florez's injuries as "pre-existing in nature" throughout the trial (R. 908 at 55:2-6; 58-63; 64:2-12; 690:13-14; 693:14-16; 700:12-14; 703:11-14), the trial court had the obligation to see that the jury was accurately instructed on the law. *Kilpatrick v. Wiley*, 2001 UT 107, ¶ 65, 37 P.3d 1130, citing *Black v. McKnight*, 562 P.2d 621, 622 (Utah 1977).

D. Schindler Waives Any Error Based on Improper Comments at Trial

Schindler alleges Florez' counsel's comments warrant a new trial. At trial, Schindler objected to only two of the comments listed in Schindler's brief. Further, Schindler failed to ask for any curative instruction. As such, Schindler failed to preserve any allegations of improper conduct for appeal. "Absent an objection by [a] defendant, we will presume waiver of all arguments regarding the appropriateness of counsel's statements unless the error falls into the category of plain error." *Noramandeau v. Hanson Equipment, Inc.* 2007 UT App 382, ¶ 30, 74 P.3d 1, citing *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992). See *also West v. Johnson & Johnson Prod., Inc.*, 174 Cal. App. 3d 831 (Cal. Ct. App. 1986), ("[i]n absence of timely objection the offended party is deemed to have waived the claim of error through his

[9]On appeal, Schindler also asserts that an instruction should have been given on the role of the treating physicians. (Schindler's Brief at 40-42) As Schindler did not request this instruction at trial, any alleged error would be waived.

participation in the atmosphere which produced the claim of prejudice." *Id.* at 861; holding no new trial warranted for counsel's reference to Johnson and Johnson as "old and big and very successful," description of defendant being dragged "kicking and screaming into the courthouse", counsel's attempt to testify himself and other comments of the same ilk); *Hilliard v. A.H. Robins Co.,* 148 Cal. App.3d 374, 407 (Cal. Ct. App. 1984) (allegation of misconduct on appeal was waived because defendant failed to ask the court that the jury be admonished to ignore the statements or questions of lawyer's long litany of *sustained* objections, including, reference to death, inflammatory remarks about the subject of the lawsuit, berating witnesses and opposing counsel, violations of court orders, improper use of "do you know" questions); *Sarkozy v. A.P. Green Industries, Inc.,* 2009 WL 2356676 *19 (N.J. Super A.D.) (although defendant's objections to fleeting comments were sustained, counsel failed to request a curative instruction depriving the trial court an opportunity to correct the situation and creating waiver of error on appeal.)

a. Notwithstanding Schindler Failed to Object to Comments Cited in Schindler's Brief, Counsel's Comments Do Not Justify the Overturning of a Well Reasoned Jury Verdict

As the trial court noted "this was a hard fought, hotly contested, jury trial. Emotions did run high." (R853, ¶ 2) Unfortunately, as such, there were instances wherein both lead counsel pushed the envelope on permissible commentary. Nonetheless, the commentary from counsel' did not rise to the level of legally requiring a new trial. *See Hilliard v. A.H. Robins Co.,* 148 Cal. App.3d 374, 407 (Cal. Ct. App. 1984) ("The factual issues were complex and emotional. It was inevitable that the lawyers, swept up in subjective feelings for their

respective clients, in a few instances, might have over stepped the permissible line of proper lawyering conduct. The able trial judge . . . did not permit the trial to degenerate into a free-for-all. . . . there was substantial evidence presented to the jury to support the verdict . . . There was no miscarriage of justice;")

Schindler relies on one Utah case to assert counsel's remarks established an improper appealing "to the social or economic prejudices of the jury," *Donohue v. IHC, Inc.* 748 P.2d 1067 (Utah 1987).[10] In *Donohue*, the Utah Supreme Court did *not* hold a particular comment "improper", as asserted by Schindler. (Schindler's Brief at 47). There were multiple comments reviewed and the Supreme Court made no determination of the appropriateness of any specific comment. Rather, the Supreme Court upheld the trial court's discretion in allowing a new trial by stating, "[w]e are able to assess only the words as they appear in the records. **The trial judge, on the other hand, was able to note other relevant factors such as counsel's gestures, inflection and expressions, as well as the jury's reaction...**

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[10]Schindler strings together counsel's comments in a different order than they were presented to create an illusion. Despite Schindler's liberty with counsel's comments, it is important to note the few instances in which Schindler's size or corporate status was referenced during more than three hours of opening/closing argument and four days of trial. The first reference was merely an introduction of the defendant, coupled with the representation that Schindler builds, installs and maintains their own elevators and thus, there is no third party responsible. Schindler never objected to this introduction, preventing Florez or the court from realizing there was even a concern.
The additional instance has been misrepresented by Schindler. Schindler misquotes the record. When counsel was responding to Schindler's unreasonable tactic of engaging in no discovery but spending a tremendous amount of money to fly Dr. Knoebel in to Utah to claim Connie is lying and then belittling every witness on the stand as dishonest, counsel questioned the fairness of these dictatorial tactics by "a person" and then threw in "<u>or</u> a corporation". Schindler represents that counsel stated it is unjust for "a person <u>of</u> a corporation" to proceed in this manner. This misrepresentation implies Schindler was being referred to for it's size rather than the questionableness of its overbearing and condescending tactics at trial.

Trial courts are in a much better position than are appellate courts to assess the overall effect of attorney misconduct at trial." *Id.* at 1068. (Emphasis added.)

Here, similarly, the trial court's advantageous position in witnessing the entire trial rather than brief excerpts taken out of context, should be given deference. The trial court admittedly did not condone some of the comments, but held that "taken as a whole and in context, [counsel's] comments did not rise to the level of invoking the passion and prejudice of the jury." [R. 0853, ¶2)

Utah law allows "counsel wide latitude in closing arguments" and holds that "effective argument may employ various forensic skills designed to persuade a jury to view the evidence with a particular perspective." *Jones v. Carvell*, 641 P.2d 105, 112 (Utah 1982) Yet, for the closing argument to warrant a new trial it would have to go so far as to "affect the fundamental fairness of the trial" and the offended party must show that "a different result would have occurred". *Id.* at 112. In this case, there is no evidence that counsel's comments in any way affected the fundamental fairness of the trial and the jury verdict. Still, Florez responds to the two comments objected to at trial:

1. Comments on Schindler's Admission of Negligence

Schindler asserts Florez' counsel discussed Schindler's admitted negligence "contrary to the court's ruling that it should not be discussed before the jury and the parties' stipulation of negligence". (Schindler's Brief at 24) This is inaccurate. There was no pre-trial ruling that prohibited Florez from discussing Schindler's admission of liability with the jury and there was no concrete stipulation on this issue. Florez fought Schindler for several years on

liability, without any concession from Schindler. Two weeks before trial Schindler submitted a pre-trial ordering indicating there was a stipulation on liability. (R. 0657, No. 3) Florez submitted a pre-trial order that included no such stipulation. (R. 0669-70) The trial court signed neither party's proposed order prior to trial. (R. 0657)

Regardless of the facts surrounding Schindler's admission, Schindler fails to explain how counsel's minor reference to Schindler's admission of liability prejudiced Schindler to the point of requiring a new trial. The minor comments made during the first five minutes of opening statements had no bearing on the ultimate determination of whether or not the medical evidence demonstrated Florez was injured.

2. Counsel's Statement That He Knew His Client

In four days of trial and in the two hours of closing arguments, Florez' counsel, admittedly, made an inappropriate comment. Florez' counsel unintentionally stated "I know Connie" during an off-the-cuff apology. This statement was made during rebuttal, it was not planned and counsel was *not* offering testimony. Still, after reviewing how this comment could be interpreted as vouching for his client, counsel regrets the comment. Notwithstanding any regret, the key is whether counsel's statement warrants a new trial.

First and foremost, the statement must be put into accurate context. Florez' counsel was reviewing the multiple allegations levied against his client by Schindler during his closing arguments. Florez' counsel was questioning Schindler's surprising accusation in closing that, for years, Florez had been going to doctors and taking medications for a heart condition that was not real, i.e. it was invented to gain sympathy from people. (R. 911 at 680:2 -684:10)

When Florez' counsel realized the volume of his voice had risen, he took a deep breath and stated, "I'm sorry for getting upset, but I can only take so much of this – I know Connie – he doesn't." (R. 910 at 716:3-21)

Contrary to Schindler's allegations of repeated, direct, vouching for the veracity of his client, at no time did counsel state that he had *personal* knowledge that Connie was a truthful person. It was the witnesses who testified Florez was truthful. (R. 908 at 81:25 - 82:2;R. 908 at 101:10-12;R. 908 at 117:7-118:1) In actuality, counsel's statement made within an apology illustrates counsel was not intending to testify at all. Counsel was merely attempting to explain his angry demeanor by suggesting that when you work for an individual for four years you develop a personal relationship which lends to heightened reaction to personal attacks versus someone who has no personal relationship with the individual - its easier for them to assert personal attacks.

Second, even assuming counsel's apology was interpreted as "vouching for his client's credibility", the comment does not warrant a new trial. In, *Lerma v. Walmart*, 148 P.3d 880 (OK 2006), the Oklahoma Supreme Court looked at the same assertion being made by Schindler in this case, i.e. that counsel improperly vouched for his client's credibility. The Supreme Court upheld the trial court's denial of a new trial by holding:

> "It is improper for counsel to vouch for the credibility of witnesses. Improper remarks used by counsel in argument, however, are not grounds for reversal where the language was provoked by remarks of counsel for the adverse party, unless it appears quite plainly that the verdict was influenced thereby. The rule applies even though the language used would otherwise warrant a reversal in the absence of such provocation." *Id.* at 885 citations omitted.

While the parties may debate the meaning of Florez' counsel's statement when he stated that he "knew Connie", it is undisputable that the statement was made in direct response to provocation by Schindler's counsel. The statement in question was made *in rebuttal*, while responding to Schindler's specific accusation that Florez had deceitfully created a non-exist heart condition.

Schindler is unable to demonstrate that counsel's comments influenced the jury to the extent that a different result would have occurred. *See Jones v. Carvell*, 641 P.2d 105,112 (Utah 1982); *Moore v. Vanderloo,* 386 N.W. 2d 108, 116-117 (Iowa. 1986) (Before granting a new trial for misconduct in arguments it must appear a different result would have been probable, but for the misconduct.)

As observed by the trial court, the jury presented a verdict that was "well thought out, rational, and not the result of passion or prejudice. It was not a 'runaway' jury. It was not an excessive verdict. The verdict was well within the discretion and prerogative of the jury". (R. 0853) The trial court's first hand perspective of counsels' comments, the evidence, and the jury verdict, should be affirmed.

CONCLUSION

Schindler gave up on liability, conducted cursory discovery, relied upon internet articles as authoritative medical evidence, failed to hire their own expert regarding causation of BPPV, presented a single witness in opposition to Florez case at trial, and, ultimately, relied on a defense which personally attacked the credibility and veracity of Florez, the witnesses and opposing counsel. Schindler now asks this Court not merely for a second

chance, but to overturn the trial court's denial of summary judgment and dismiss Florez' claim. Two different trial court judges and a jury found Schindler's arguments lacked persuasive value. This Court should be equally unpersuaded by the arguments raised on appeal. Schindler's requests on appeal should be denied in their entirety.

DATED this 15th day of January, 2010.

LINDY VANDYKE
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of January, 2010, a copy of the foregoing was served in the manner indicated below upon the following:

Scott Lilja
Cassie Medura
VANCOTT BAGLEY CORNWALL & MCCARTHY
36 South State #1900
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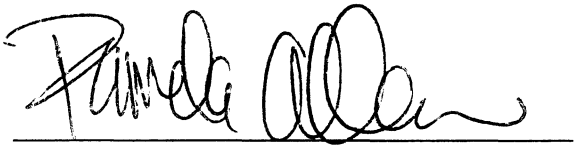
X U.S. Mail
___ Hand Delivered
___ Overnight
___ Facsimile
___ No Service



ADDENDUM
A

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 59. New trials; amendments of judgment.

(a) Grounds Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 702. Testimony by experts.

(a) Subject to the limitations in subsection (b), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.

(c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Advisory Committee Note.

Apart from its introductory clause, part (a) of the amended Rule recites verbatim Federal Rule 702 as it appeared before it was amended in 2000 to respond to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The 2007 amendment to the Rule added that introductory clause, along with parts (b) and (c). Unlike its predecessor, the amended rule does not incorporate the text of the Federal Rule. Although Utah law foreshadowed in many respects the developments in federal law that commenced with Daubert, the 2007 amendment preserves and clarifies differences between the Utah and federal approaches to expert testimony.

The amended rule embodies several general considerations. First, the rule is intended to be applied to all expert testimony. In this respect, the rule follows federal law as announced in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Next, like its federal counterpart, Utah's rule assigns to trial judges a "gatekeeper" responsibility to screen out unreliable expert testimony. In performing their gatekeeper function, trial judges should confront proposed expert testimony with rational skepticism. This degree of scrutiny is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability. The rational skeptic is receptive to any plausible evidence that may bear on reliability. She is mindful that several principles, methods or techniques may be suitably reliable to merit admission into evidence for consideration by the trier of fact. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical", but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Finally, the gatekeeping trial judge must take care to direct her skepticism to the particular proposition that the expert testimony is offered to support. The Daubert court characterized this task as focusing on the "work at hand". The practitioner should equally take care that the proffered expert testimony reliably addresses the "work at hand", and that the foundation of reliability presented for it reflects that consideration.

Section (c) retains limited features of the traditional Frye test for expert testimony. Generally accepted principles and methods may be admitted based on judicial notice. The nature of the "work at hand" is especially important here. It might be important in some cases for an expert to educate the factfinder about general principles, without attempting to apply these principles to the specific facts of the case. The rule recognizes that an expert on the stand may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts. Proposed expert testimony that seeks to set out relevant principles, methods or techniques without offering an opinion about how they should be applied to a particular array of facts will be, in most instances, more eligible for admission under section (c) than case specific opinion testimony. There are, however, scientific or specialized methods or techniques applied at a level of considerable operational detail that have acquired sufficient general acceptance to merit admission under section (c).

The concept of general acceptance as used in section (c) is intended to replace the novel vs. non-novel dichotomy that has served as a central analytical tool in Utah's Rule 702 jurisprudence. The failure to show general acceptance meriting admission under section (c) does not mean the evidence is inadmissible, only that the threshold showing for reliability under section (b) must be shown by other means.

Section (b) adopts the three general categories of inquiry for expert testimony contained in the federal rule. Unlike the federal rule, however, the Utah rule notes that the proponent of the testimony is required to make only a "threshold" showing. That "threshold" requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct. When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Contrary and inconsistent opinions may simultaneously meet the threshold; it is for the factfinder to reconcile - or choose between - the different opinions. As such, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert, and it is not contemplated that evidentiary hearings will be routinely required in order for the trial judge to fulfill his role as a rationally skeptical gatekeeper. In the typical case, admissibility under the rule may be determined based on affidavits, expert reports prepared pursuant to Utah R.Civ.P. 26, deposition testimony and memoranda of counsel.

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Advisory Committee Note – This rule is the federal rule, verbatim. The 2009 amendment adopts changes made to Federal Rule of Evidence 703 effective December 1, 2000.

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim. The substance of this rule was formerly found in Rules 57 and 58, Utah Rules of Evidence (1971). The requirement that an expert disclose the underlying facts or data for his opinion when cross-examined was formerly found in Rule 58, Utah Rules of Evidence (1971). The discretion vested in the trial judge to require prior disclosure of underlying facts or data should be liberally exercised in situations where there has not been adequate discovery in civil cases or disclosure in criminal cases.

INSTRUCTION NO. ___

AGGRAVATION OF SYMPTOMATIC PRE-EXISTING CONDITIONS.

A person who has a [physical, emotional, or mental] condition before the time of [describe event] is not entitled to recover damages for that condition or disability. However, the injured person is entitled to recover damages for any aggravation of the pre-existing condition that was cause by [name of defendant]'s fault, even if the person's pre-existing condition made [him] more vulnerable to physical [or emotional] harm than the average person. This is true even if another person may not have suffered any harm form the event at all.

When a pre-existing condition makes the damages from injuries greater than they would have been without the condition, it is your duty to try to determine what portion of the [specific harm] to [name of plaintiff] was caused by the pre-existing condition and what portion was caused by the [describe event].

If you are not able to make such an apportionment, then you must conclude that the entire [specific harm] to [name plaintiff] was caused by [name of defendant]'s fault.

References
Robinson v. All-Star Delivery, 992 P.2d 969, 972 (Utah 1999).
Tingey v. Christensen, 1999 UT 68, 987 P.2d 588 (Utah 1999).
Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966).
MUJI 1st 27.6
MUJI 2nd CV 2018

Committee Notes
This instruction is not intended to suggest that the verdict form include a line-item allocation of what part of the harm can be apportioned to the pre-existing condition, and what part to the defendant's fault. That question is answered by the jury's award of damages and should not be confused with allocation of comparative fault.

ADDENDUM
B

IN RE:	)	Case No. 050902302
	)	
FLOREZ v. SCHINDLER	)	
	)	Pretrial Conference

REPORTER'S TRANSCRIPT OF PREVIOUSLY-RECORDED PROCEEDINGS

DATE RECORDED: September 3, 2008

DATE TRANSCRIBED: January 5, 2009

TRANSCRIBED BY: Kelly L. Wilburn, CSR, RPR

PROCEEDINGS

THE COURT: All right, that brings us to Florez and Schindler.

All right. This is the time set for pretrial, but I see there are two issues floating around that we need to address. One has a notice to submit and the other one doesn't, but I noticed that -- well, let's start.

The first one is a motion to exclude testimony, and then the second one is an objection that was filed in regards to pretrial disclosures, correct?

MS. VANDYKE: Correct.

SPEAKER #2: Correct, your Honor.

THE COURT: All right. So let's start first with the motion in limine. That's yours.

SPEAKER #2: It is. I assume the Court's had an opportunity to read the papers --

THE COURT: I have.

SPEAKER #2: -- so I'm not gonna rehash this thing ad nauseam. This motion goes to the testimony of Dr. Brian Morgan, who's a doctor who's been retained as an expert by Ms. Florez to testify both with regard to a diagnosis of vertigo, and to testify that that vertigo was caused by an incident on

June 15, 2004, when she was trapped in an elevator.

Under the standard of Ramash (phonetic), your Honor, which I'm sure the Court's familiar with, in order for a expert to testify they have to meet some qualifications. In addition to being of assistance to the trier of fact they have to testify with regard to scientific principles that are inherently reliable.

They have to have properly applied those, and be a person qualified to do that. And the testimony has to be founded on that work. And finally, the testimony that's proffered must be more probative than prejudicial.

Dr. Morgan is a sports medicine doctor. He has no training in entolaryngol -- boy, I have a tough time with that one. Entolaryngology -- yeah, that's it -- neurology, or anything associated with the condition of vertigo, which is a condition of the inner ear.

He testified in his deposition that what he did is he read through these medical records and he adopted a diagnosis that had been made by a Dr. Siddoway. Dr. Siddoway is a qualified doctor in this area.

The problem that you run into is that the person who's testifying isn't qualified. And the

person who is qualified can't testify as an expert because he's a treating physician who has not been designated as an expert and has not submitted an expert report under Rule 26(a)(3.)

So what they're trying to do is get testimony in through an unqualified witness that cannot come in through what would have been a qualified witness had they complied with the rules with regard to experts.

Finally, your Honor, I think having Dr. Morgan, as a medical doctor, testify to the jury that this, that this is the diagnosis of this Plaintiff when in fact he has no qualifications to do so -- all he's doing, he's reading a, a document. And he's saying, This document says this.

Now, that gives undue weight to that piece of paper because it's being parroted by a guy the jury is looking at and saying, Well, he's a medical doctor. Not necessarily understanding the difference between a medical doctor who's a sports medicine doc and a medical doctor who is a neurologist.

So I think that there are problems with regard to Dr. Morgan on that front. Dr. Morgan also -- although it doesn't appear in his expert report -- in his deposition testified that this vertigo condition was caused by this incident on

June 15, 2004.

And he testified that he reached that conclusion as to causation because he looked at the medical records after that incident on that date and he said she now had been diagnosed with vertigo. And he said the records he saw prior to that date did not show any condition of vertigo; therefore, this, this incident was the cause of the vertigo.

Well, your Honor, first of all it's not scientific testimony. There -- it doesn't meet the Ramash standards. He didn't apply any scientific principles whatsoever. He read documents and said, This is what I saw here and this is what I saw here.

But he's also wrong, because there is a specific document -- and we attached it as Exhibit H to our memorandum -- where Dr. Siddoway diagnosed this patient as having vertigo and treated her for vertigo two years prior.

Beyond that, Dr. Morgan has submitted no testimony whatsoever with regard to any other injury caused by this incident. The only thing he testified to was that this vertigo condition was caused by this incident.

They are trying to claim damages for rib injury, back injury, various other injuries. There's

absolutely no testimony, no expert, nothing to establish any causation with regard to anything other than vertigo.

And as I point out, the vertigo testimony is highly suspect, your Honor.

THE COURT: Okay.

SPEAKER #2: Thank you.

THE COURT: Response? Who's up?

MS. VANDYKE: Defendant raises the Ramash step -- standard today to the Court, but interestingly the Court will note that was not raised in their initial motion so we didn't have an opportunity. That was later addressed in the reply.

What we did do in the opposition, that I would direct the Court's attention to, is address the standard under Rule 703. Which of course has superseded or encompassed Ramash standard, the more recent rule. And how -- and we did, in our opposition, lay out how we had met those Rule 703 standards.

The motion filed by Defendant originally discussed this issue of can Dr. Morgan testify against -- or testify in a specialty and rely -- that he is not -- he's relying on a diagnosis of a doctor in another specialty. There you go.

And as we pointed out in our opposition, this is a generally accepted practice. There's been no evidence introduced by Defendant or anyone that this isn't commonly done. And in fact even Defendant admits that this is Dr. Morgan's specialty.

His specialty is actually evaluating, taking records from other doctors, and determining these types of issues. You take a specialist, he, he -- his total specialty is rehabilitation. You take somebody who's injured, you evaluate the multiple areas of injury, and you do have to refer them out to other subspecialties for treatment.

However, he commonly -- and it's generally accepted in the community -- relies upon the treating physician for the particular diagnosis. And that's what he did here. He relied upon the diagnosis of Dr. Siddoway, and then used his special expertise in the area of trauma and rehabilitation. Which is what kind of causes -- what kind of areas cause vertigo.

And he determined that a trauma to the head -- which is what was sustained by the Plaintiff in this case -- can be a cause of this vertigo. And then looking upon the past history and he makes the determination that this was the precipitating factor that caused the vertigo.

They reference one medical record where she'd experienced vertigo in the past. There is no diagnosis by any doctor of the vertigo in the past. There's no affidavit produced by any doctor suggesting that she had a positional vertigo or diagnosis in the past.

There was one medical record over a 50-year history where she checked symptomology positive for being dizzy. That does not equate to positional vertigo. What that goes to is the weight of Dr. Morgan's testimony.

Defendant is allowed then to get up and question, Did you see this record on this date where she complained of vertigo? Yes, I did. That type of situation. But that does not exclude admissibility under Rule 703.

Under Rule 703, as stated in the Plaintiff's opposition, Dr. Morgan has met all of the requirements. He's using a gen -- generally accepted practice, applying it to specific facts of this case, and using his specialized knowledge and expertise in the area of rehabilitation to come to his conclusion.

THE COURT: So is Dr. Morgan going to give me his or her own opinion, as opposed to just parroting Dr. Siddoway's? Your position is he's reviewed this

and his opinion is consistent with Dr. Siddoway's?

MS. VANDYKE: Yes. Yes, but he's taking it a step further in the sense that he's relying upon the diagnosis in the subspecialty, but in terms of causation Dr. Morgan is the one with experience in trauma, can this condition be caused by a trauma to the head?

And in his experience, with his rehabilitation of individuals who've experienced physical trauma, yes, this is a condition that can be caused by trauma to head -- to the head.

THE COURT: Okay.

MS. VANDYKE: So --

THE COURT: But he didn't -- he did not -- is he accepting Dr. Siddoway's position in regards to what the diagnosis was as to vertigo?

MS. VANDYKE: Yes.

THE COURT: He did not make his own independent determination of vertigo?

MS. VANDYKE: That is accurate, your Honor. There was --

THE COURT: But, but he's filling in the -- one chink of your case that says the vertigo could have been caused by a blunt to the --

MS. VANDYKE: Yes, trauma to the head.

THE COURT: Trauma to the head. Trauma.

MS. VANDYKE: Yes. In fact, there was two doctors -- and that's a -- really a dimension that's hard to pronounce, but it's a really -- it's a subspecialty area. And there's different tests you do, and they're extensive, and they're expensive tests.

So Dr. Morgan, no, did not repeat those tests. He's replying -- relying on the evaluation of actually both Siddoway and then there's a Dr. Shelton, at the University of Utah, who also did some tests and confirmed that diagnosis.

THE COURT: So I suspect that Dr. Morgan could have disagreed and said that this couldn't have happened in that way?

MS. VANDYKE: Yes.

THE COURT: Okay.

MS. VANDYKE: Absolutely. And then the last argument that was also raised in the reply -- that we haven't had an opportunity to respond to -- is somehow that he can't rely on Dr. Siddoway because Dr. Siddoway was a treating physician. He didn't provide an expert report.

Like I said, this has just been raised in the reply memorandum. We've not opportunity -- there's

never been an objection filed to us that somehow Dr. Siddoway needed to provide an expert report. We'd be happy to address them on a separate motion if that's an issue.

But in this case I don't think it is because, as I mentioned, under Rule 703 it is a standard and generally accepted practice for one doctor to rely on the diagnosis of another doctor in offering his opinion.

And I know of no requirement that relying upon the other doctor, that doctor had to produce an expert report in order to rely on his diagnosis and his treating records.

THE COURT: Okay thank you. Response?

SPEAKER #2: Yeah. Ramash is, is the law under (inaudible), as the Court knows. With regard to this, Counsel just said that Dr. Morgan was gonna testify that this condition was caused by a trauma to the head, and her past history, and the precipitating factors.

And none of that's in his report, your Honor. And he didn't testify to any of that at his deposition.

SPEAKER UNKNOWN: (Inaudible.)

SPEAKER #2: That's, that's, that's a

fabrication. His report has to contain his opinions. That is not in his report. And what he said at his deposition is -- when asked about this -- he said -- on questioning of:

> "Why did you use the word benign if there's no difference between benign positional vertigo and positional vertigo? It's your report, you used the word, I'd like to know why you used the word.
>
> "If I can reference to No. 33 in the review of records, Dr. John Siddoway gave an impression: Symptoms quite typical of benign positional -- positional vertigo.
>
> "I feel that she had benign positional vertigo. I concur with his diagnosis. If there seems to be a problem with that, I would refer you to Dr. Siddoway."

He never testified as to make -- reaching any opinion, through any testing, through any independent knowledge, through any study or research, that this patient had this condition. He relied solely on what Dr. Siddoway had told -- had stated in the medical

records.

There's no expertise involved in that, your Honor. He has absolutely zero training to be, to be testifying as to this.

THE COURT: Am I not gonna hear from Dr. Siddoway? Or the jury not gonna hear from Dr. Siddoway?

MR. WARD: No, he's been subpoenaed, your Honor.

THE COURT: Okay.

MR. WARD: But that's got nothing to do with what Dr. Morgan can testify to.

THE COURT: Well, I, I -- maybe I'm missing something, but I, I -- if Dr. Siddoway takes the stand and testifies that he did a diagnosis of vertigo. And then Dr. Morgan takes the stand and says, I relied upon Dr. Siddigo -- Dr. Siddoway's diagnosis of vertigo, and from that I conclude that this could have been caused by a blunt instrument.

Then their testimony -- or not a blunt instrument, head trauma. Then, then I don't see why that testimony's not admissible. You can always attack Dr. Siddoway for the prognosis or the diagnosis in the first place. You can always attack Dr. Morgan for relying upon it.

I understand that -- I thought maybe that your point was that the only one that was gonna testify was Dr. Morgan. And therefore they were gonna bootstrap Dr. Siddoway's opinion in with just using Dr. Morgan, who never did the analysis.

But I understand Dr. Morgan's gonna testify that the vertigo could have been caused by the head trauma, and Dr. Siddoway is not going to testify to that.

SPEAKER #2: Well --

THE COURT: Now, you -- you're still -- as long as Dr. Siddoway testifies you can always attack his testimony. And you can always attack his diagnosis. And you can always say, A, he shouldn't have reached that conclusion, and B, Dr. Morgan shouldn't have relied upon it.

But I thought you were clearly saying that they were just gonna call Dr. Morgan, and bootstrap Dr. Siddoway's testimony in and he was never going to appear. But it seems to me the doctors are testifying on two different issues, but they are entitled to rely upon each other's diagnosis.

SPEAKER #2: Except that Dr. Siddoway will be giving an expert opinion and has not been designated as an expert in this case.

THE COURT: But isn't it as to true --

SPEAKER #2: And under (inaudible) versus Youngblood, he's not entitled to do that.

THE COURT: He's not entitled to, to give his opinion as to what his diagnosis and his treatment was?

SPEAKER #2: No. He's entitled to testify as to the facts of his treatment. But he is not entitled to render any expert opinions with regard to causation, or treatment, or anything else.

THE COURT: Well, but I didn't understand him to do so. I thought he was only going to testify that she had vertigo, and that Dr. Morgan is being used to testify as to what the cause was. Now, that's the way I understand the chain. And if that's the chain, then they're entitled to go that way.

I would agree with you that, that Dr. Siddoway, as a treating physician, can't come in and say that the trauma caused the vertigo. But he can come in and say, I examined this patient, I looked at this patient, and I diagnosed her with vertigo.

Then Dr. Morgan comes in and testifies and says, That vertigo could have been caused or was caused by the trauma blow to her head on such and such a day. I don't have a problem with that.

SPEAKER #2: Okay.

THE COURT: I don't see that problem.

SPEAKER #2: Two things. With regard to Dr. Siddoway. The minute he says, And I diagnosed her, he's giving an expert opinion. Under, under the Pete versus Youngblood case that is not admissible as expert testimony because they have not provided an expert report with regard to that.

THE COURT: No, I, I, I disagree with that one, Counsel.

SPEAKER #2: Okay.

THE COURT: I think that's what treating physicians do. They're entitled to make a diagnosis. That -- the opinion that she has vertigo would be within his realm, as a treating physician, to make that diagnosis.

I've always viewed expert testimony in the sense of now taking that and putting it somewhere in regards to causation or some of the old terms that we used to have. I, I understand they gotta bring in an expert to do that.

But clearly the diagnosis and the treatment would be within that physician. If I fall out of a tree and break my leg, my treating physician is, is fair to say, He broke his leg. That was a broken leg.

It was consistent with my experience as a doctor and my expertise as a doctor, and I treated him as such.

Now, he may not be able to say that the cause of that broken leg was because Judge West fell out of a tree or was pushed by a tree. That's gonna require someone else to come in and show the causation. But clearly my treating physician can tell me, It's a broken leg, and I treated it as a broken leg.

And he's giving an expert opinion, because you or Mr. Ward couldn't look at my leg and say, That's a broken leg. Well, maybe you could. But, I mean, you wouldn't be recognized as experts because you guys are brilliant lawyers, you're not brilliant physicians.

So I, I, I see the distinction there. I think treating physicians can give opinions, even expert opinions, within their expertise. But I don't really think they're entitled to extrapolate it out like other experts are required to do.

SPEAKER #2: Okay. The next problem is this. Once you get that diagnosis you say, Well, he can come in and testify that a blow to the head can cause that. It's not in his report, okay? He didn't say --

THE COURT: In Dr. Morgan's or Dr. Siddoway?

SPEAKER #2: Not in Dr. Morgan's report.

THE COURT: Okay.

SPEAKER #2: He didn't say, This was caused by a blow to the head that happened in connection with this incident. When he was asked in his deposition, this is what he said:

"So just to clarify, because you didn't see anything -- any prior history of dizziness, you concluded, based on this accident, that the accident must have been cause -- must have caused the vertigo; is that correct?

"That was my causation, correct."

That's it. That's all he said. Now, they've done a good job doing their research since then. And now they're gonna have him come in and testify something that's not in his report, didn't testify to it, and it's not admissible.

His opinions have to be in his report or they are not admissible in this court, your Honor.

THE COURT: Okay.

Ms. Vandyke, do you have a response to that?

MR. WARD: Just want to (inaudible) --

THE COURT: Or Mr. Ward?

MR. WARD: -- your Honor, because I was at that depo that he's quoting.

SPEAKER #2: Your Honor, I'd prefer that we have one lawyer argue the matter.

MR. WARD: Well, do you want to hear what happened at the depo? Because he only read part of it, your Honor.

THE COURT: Okay.

SPEAKER #2: I --

MR. WARD: What happened was --

SPEAKER #2: I read the entire thing, your Honor.

MR. WARD: What happened was, when -- what he said -- the gentleman taking the depo wasn't Mr. (Inaudible), it was his associate. And I was there.

And the associate came back and said, you know, Are you sure you're gonna say this thing fell (inaudible)? Because she fell and hit her head kind of thing.

And he said to him, Look, you've been trying now for a long time to get me to say it's something besides this fall, and I'm not gonna say that. It's the fall.

At that point, the deposition was disbanded. He went and called Mr. (Inaudible.) Came back in and said, We don't want to talk to you anymore, and they

walked out.

So I don't even know if that got on the record, but that's what happened. He kept going at him, trying to get him to say anything but the fall caused this.

And the doctor kept saying, No, I think it's the fall. Finally the doctor got frustrated and said that to him and they called the depo.

THE COURT: Why does the report --

MS. VANDYKE: Your Honor --

THE COURT: What, what -- he raised some good points, let me follow up on them. What does the report say that was submitted?

MR. WARD: (Inaudible.)

MS. VANDYKE: I'll respond. That's just about the depo.

Your Honor, Dr. Morgan was asked to evaluate was there any injuries as a result of this incident. As your Honor is probably aware, frequently doctors will come back and say, No, there wasn't. I don't believe there was injuries. Other words there was no causation.

What he determined as his conclusion was there was a four percent impairment, meaning as a result of the vertigo. And he actually didn't find an

impairment for the rib injury because there is none under the AMA guidelines.

But he did say under the AMA guidelines she has a four percent permanent impairment as result of this incident. Like I said, I've seen many reports where they come back and say, No, there was no injuries, there's no causation, there is a zero percent impairment.

So he's wanting him -- he's now taking it to a higher standard. Wanting him to say, The four percent permanent impairment as a result of the incident means I think that the vertigo was a cause of the elevator accident.

Well, the question posed to him in a letter form was, Do you think she was injured as a result of this? If so, what injuries did he (sic) suffer?

So the response is, As a result of the incer -- the incident, she suffered a four percent impairment.

So it is in the report because that's his conclusion. Four percent permanent impo -- impairment because of the vertigo because of the elevator incident. It is in his report.

THE COURT: Are you extrapolating that from the report, or is that clear?

MS. VANDYKE: It's very clear. Like I said --

SPEAKER #2: (Inaudible.)

MS. VANDYKE: -- I've gotten reports, and so has he. In fact their doctor, their doctor came back and said --

THE COURT: Do I have a copy of the report? I don't, I don't --

SPEAKER #2: You do, your Honor.

MS. VANDYKE: Absolutely.

THE COURT: I don't remember reading that.

SPEAKER #2: Yeah, it's attached as Exhibit D to our memorandum.

MS. VANDYKE: And their doctor came back and did just the opposite. Said, I think there's a zero percent impairment. I don't think she was hurt. I don't think the vertigo was caused by the elevator.

And Dr. Morgan said, I do believe it was caused by the elevator incident, and so I'm awarding her a four percent impairment.

SPEAKER #2: And if you'll read the conclusion that isn't there, your Honor.

MS. VANDYKE: And I actually do have the deposition confirming what Mr. Ward said in terms of the testimony. Taking a break and coming back and

telling him, I have no further questions.

But he was never, ever asked about -- when he said, They've done their homework, I mean, it's ridiculous to suggest that the attorneys have created causation. He, he's a medical professional. He testified on causation.

We didn't come back and do research and change his opinion or offer him an opinion. There was about a 15-minute deposition, I believe. I'd have to check the numbers. But it was really short, and they walked out.

And that's not doctor -- it doesn't go to the deficit of Dr. Morgan.

THE COURT: Okay. Response?

SPEAKER #2: Well, I think you can read the report, your Honor. It's not --

THE COURT: I found it.

SPEAKER #2: And you can also read the deposition, because we've attached it. And what this doctor said is the basis on which he determined that this, this injury arose from and was caused by this incident was, I felt -- and this is out of his depo:

"I felt that without any prior history of dizziness, and reviewing the records, that it was, that it was --

that was causation related to the elevator accident."

Okay?

THE COURT: Uh-huh (affirmative.)

SPEAKER #2: That's the basis on which he reached his conclusion. That's it. And it was repeated back to him, just to clarify, that:

"Because you didn't see any existing -- any prior history of dizziness you concluded, based on this accident, that the accident must have been caused by vertigo; is that correct?

"That was my causation, correct."

That's what he's saying. I saw it in the records after, I didn't see it in the records before. He didn't say anything about trauma to the head. He didn't say about -- anything about doing any testing. He didn't say anything about anything. That's what he said, your Honor.

THE COURT: Okay. No, I, I think the report's clear enough. I'm looking at page 6, one -- well, that first one is a half a paragraph. One, two, third, third paragraph, or the second full one:

"It is apparent that at the current

time the patient continues to have symptoms since the time of the injury, although in the medical red -- record it states from the vestibular rehab notes that the patient was having no symptoms at that time.

"With the somewhat inconsistencies of current systems versus resolution of symptoms, I feel that the patient most appropriately fits into the four percent impairment of the whole person, as outlined in Example 35 on 312 of the Guides to Evaluation of Permanent Impairment.

"This clearly fits into Class 1 classification between 0 and 14 percent of the whole person."

Then he goes on to talk about the impairment rating. He then goes on to talk about the fact in paragraph 3, No. 3:

"It is my medical opinion that the patient will need further medical attention regarding her dizziness and benign positional vertigo."

And he goes on, and on, and on and talks

about that. I think a fair reading of the doctor's report is that he's of the opinion that the accident was the cause of her vertigo, and at least enough to go to the jury.

They may not agree with me. They may agree with you, they may not agree with Mr. Ward. But I think it's their determination to make that issue.

SPEAKER #2: Okay. Your Honor, I'd just like to point out that in deposition, when asked how he wrote that -- how he arrived at that determination of causation all he said was, I looked at the medical records. That's it. That is not an expert opinion, your Honor.

THE COURT: Well, that's gonna be the burden on Mr. Ward and Ms. Vandyke to come in and show that that is his level of expertise. That he's the type of expert that can take the opinions of all the other doctors, analyze them, review them, and say, I think this was, in fact, the cause.

I do this all the time with accident reconstructionists who were never at the accident. They never see it. They come in, they say, Officer A testified to this, Officer B talked to this, C did this.

This witness said this, this witness said

this. And as a result of all these things I put them together, and it is my considered opinion that X failed to yield the right-of-way and that was the cause of this accident.

I don't see that analogy being any different in this situation, if Mr. Ward and Ms. Vandyke can make their proof.

MR. WARD: Your Honor, I just want to point out so that you understand what happened at the depo. On the last page of the depo Dr. Morgan says on line 20, page 17 -- (inaudible) very shortly -- he says:

"You asked me for causation, I gave you causation" -- this is Dr. Morgan -- "the elevator accident. What else do you want to ask me?

"Well, I just have a few more questions.

"Okay."

And then he goes through a bunch of things. Is what he's saying is, What if I had a medical -- the question is saying, What if I had a medical record that said this?

Doctor said, Well, show me the record. Then I -- maybe it would change my opinion.

Well, I don't have it. But what if I had a record that said that? He did that few times. Then Dr. Morgan said:

> "You've asked the same question. The question is, unless I have medical records for my review I'm going to say that the elevator accident was the causation."
>
> Dr. Morgan said: "Unless you show me records that prove to me that I'm wrong, the elevator accident is the causation."

And that's (inaudible) deposition (inaudible.)

THE COURT: At this point I'm denying the motion in, in limine and we'll proceed to, to trial accordingly.

What other issues do we have that we need to discuss before we get there, anything else?

SPEAKER #2: Your Honor, I think, I think it would be worthwhile to discuss the fact that there is no causation testimony with regard to any of these other injuries. I think that would simplify things.

It's very clear from the report that the only injury as to which Dr. Morgan will testify is vertigo.

THE COURT: Okay. Response?

MS. VANDYKE: Your Honor, actually she's making two claims: One's the vertigo, one the rib, which is also discussed in Dr. Morgan's -- he talks about it, but he says she doesn't qualify under the AMA guidelines.

So what he's saying is it's not a permanent impairment. I mean -- but he's not -- again, he's not suggesting -- I don't know what he wants. Again, he's suggesting a higher standard.

THE COURT: Wait a sec --

SPEAKER #2: He didn't --

MS. VANDYKE: He finds the injuries are as a result of that, but they don't qualify for a permanent impairment.

SPEAKER #2: Your Honor, he --

MS. VANDYKE: That doesn't mean she doesn't have them.

SPEAKER #2: He didn't testify that this was -- that the rib injury was caused by --

MS. VANDYKE: (Inaudible.)

SPEAKER #2: -- the elevator.

THE COURT: What does the specific --

MR. WARD: Doesn't matter, your Honor, Dr. Ammon (phonetic) is coming to testify about the

rib injury. He's the fellow who's been working on it. So it's the same situation --

SPEAKER #2: Yeah but he can't testify as to causation, your Honor.

MR. WARD: He can testify --

SPEAKER #2: And neither, neither can Dr. Morgan if he hasn't --

MR. WARD: Morgan can tes --

SPEAKER #2: -- put it in his report.

MR. WARD: Ammon's gonna testify what the diagnosis is, and Morgan can testify to causation. Just like with Siddoway. Ammon's the one who's been treating her, not Morgan. Ammon's the one who's been treating her for years (inaudible.)

MS. VANDYKE: It --

MR. WARD: (Inaudible.)

MS. VANDYKE: Okay. Let me just, in the same page that your Honor cited earlier as being definitive he discusses both the rib and the cervical pline -- spine. And his conclusion is he doesn't say -- there's not enough evidence to support a permanent impairment.

But the same thing is he goes through the, the process of where these incidents came from, this is where she's at, this is where she started, this is

where's she's resulting symptoms. Out of those symptoms, under the AMA guidelines, this much percentage is apportioned to that.

He can still talk about was it caused --

THE COURT: So is it your position that Dr. Morgan is going to address the issue of causation here?

MS. VANDYKE: Yes.

THE COURT: But he's going to say that it doesn't qualify for a permanent --

MS. VANDYKE: Yes.

MR. WARD: Right.

MS. VANDYKE: That's exactly what he's gonna say.

THE COURT: Okay.

SPEAKER #2: Your Honor, it's not in his report. He found, he found no evidence of a rib injury whatsoever.

MS. VANDYKE: That's, that's not true. He discusses it in detail and makes the conclusion though that because -- it's on that exact same page that the Court decided as being significant on vertigo:

"I do not feel the patient has a permanent impairment of her ribs, as she is currently only reporting subjective

symptoms of pain. And without radiographic evidence of a rib fracture or rib abnormal -- normalies...."

So he talks about the rib pain. But is that something she can still claim? Absolutely. Just because it's not an impairment under the guideline does not disqualify her from making the allegation regarding the injury.

And again, the treating physician will testify about what that treatment has to undergo because of that. Dr. Morgan will testify where that came from.

SPEAKER #2: And your Honor, there's nothing in that report where he says anything except that he can find no evidence of a rib injury. He never makes any statement that there's a rib injury caused by this incident.

THE COURT: What is this language that she's reading? Why does he say:

"I do not feel the patient has a permanent impairment of her ribs, as she is currently only reporting subjective symptoms of pain. Without radiographic evidence of a rib fracture or rib abnormalities I do not feel there is

justifiable evidence to support a permanent impairment."

Doesn't that imply that --

SPEAKER #2: Your Honor, he's -- she's going in and saying, I've got a rib injury. And he said, I don't see anything that indicates this. He doesn't say anything about having any causal link to this incident.

MR. WARD: Then he can attack Dr. Morgan's analysis. But that doesn't mean it precludes the testimony.

THE COURT: I think it goes to the weight. I, I -- so far I'm, I'm convinced they can go ahead on the rib injury and they can go ahead on the vertigo. Is there anything else we can limit in this matter?

SPEAKER #2: We'd like to --

MS. VANDYKE: (Inaudible) just the objection on the pretrial disclosures.

SPEAKER #2: Yeah, we'd like to talk about witnesses and. I mean, I think the problem with the pretrial disclosures is we did -- we, you know, put everyone in there because we didn't know if we were gonna be able to reach a stipulation on medical records. And we have, I believe.

Is that right, Erik?

MR. WARD: I hope so.
SPEAKER #2: Yeah. You sent me one, and.
MR. WARD: But I haven't got it, so.
SPEAKER #2: And I've got it, I've got it with me and we'll sign that.
THE COURT: So how much --
SPEAKER #2: So that eliminates the medical providers. The other thing is, your Honor, we are willing to stipulate to negligence.
THE COURT: Okay.
SPEAKER #2: If that will eliminate from testimony our two employees that they have listed. Who are Vince Garcia and Tony Hall.
THE COURT: Okay. And are you willing to accept that stipulation?
MR. WARD: Uh-huh (affirmative.)
THE COURT: Well --
MS. VANDYKE: We are, your Honor, but the one thing is --
THE COURT: You're conditional and he's yes.
MS. VANDYKE: No.
THE COURT: So I gotta admit, it's no fair to double tag team him. Do you two agree, or --
MS. VANDYKE: Well, I'm handling the objections of pretrial disclosures.

MR. WARD: Forgive me, your Honor.
THE COURT: Okay.
SPEAKER #2: Yeah.
MS. VANDYKE: So --
THE COURT: Yeah, I --
SPEAKER #2: So I think what that does --
MS. VANDYKE: The problem I have is, is we'll go ahead -- the liability is not the issue. But eliminating -- I don't think the medical records stipulation takes care of the fact that they named 60 individuals as the documents. I think -- as their disclosure of documents.

We still need a pre -- a new pretrial disclosures from the Defendant. There is absolutely no way that we can prepare for trial based on the information they've provided to us.

THE COURT: Okay. But, but he's asked today if you -- you've reached a stipulation in regards to the medical records. He's asked you today if you'll accept the stipulation on the issue of negligence, because that gets through with two more witnesses.

How can he prepare a new order until he finds out what you are going to agree to or not agree to as of today? Because he --

SPEAKER UNKNOWN: Sure.

MS. VANDYKE: Actually, we already --
SPEAKER #2: Can I make a suggestion?
THE COURT: Yes.
MS. VANDYKE: The rec -- medical records stipulation has been out there for two weeks, and we already admitted liability over a week ago, so those were already known.
THE COURT: I understand.
SPEAKER #2: I'd like to --
THE COURT: Go ahead. I'd like -- I want to hear your suggestion.
SPEAKER #2: I haven't spoken to Counsel about this, so I guess psychic powers (inaudible.) Here's the thing. With that agreement we have one witness, okay?
THE COURT: Okay.
SPEAKER #2: Which is our medical expert. I don't know how many witnesses they have. But I can tell you that. That's our witness, okay?
THE COURT: Okay.
SPEAKER #2: So why don't they tell me who their witnesses are, and then we can cut through this.
MS. VANDYKE: We provided our pretrial disclosures --
THE COURT: Who --

MS. VANDYKE: -- and those are our witnesses.
SPEAKER #2: Which was, your Honor, about as extensive as ours.
MR. WARD: Oh.
THE COURT: How many, how many, how many do you have?
MR. WARD: Easily.
THE COURT: How many do you have?
MS. VANDYKE: I think there's five listed on there. And let me pull it out, I have it attached.
THE COURT: So you've got five and he's got one. I'm looking at a half a dozen witnesses total on this thing?
SPEAKER #2: Those, those were their will calls. And then they, they did the same thing, your Honor, they listed all of the medical providers --
MS. VANDYKE: We listed --
SPEAKER #2: -- as may calls, like we did. I mean, it's --
THE COURT: Okay.
SPEAKER #2: You know, it's standard practice.
MS. VANDYKE: No. We listed 7 individuals versus 60, your Honor.
MR. WARD: We listed seven (inaudible.)

THE COURT: Okay. So, so the anticipation is we'll still get through in four days?

MR. WARD: Oh, absolutely.

SPEAKER #2: Sure.

THE COURT: Okay.

MR. WARD: But our problem with the (inaudible) is we, we don't know whose (inaudible.) He's listed 60 names. And so we --

THE COURT: But he's now told you, he's now told you he's down to one. His doctor.

MS. VANDYKE: But, but you know what? We have no list of any documents. He listed 60 names for the documents. Not for the witnesses --

SPEAKER #2: Your Honor --

MS. VANDYKE: -- for the documents they were producing.

SPEAKER #2: I --

MS. VANDYKE: He listed 60 names.

SPEAKER #2: Another suggestion?

THE COURT: Yes.

SPEAKER #2: I will give them copies of the documents I intend to introduce into evidence.

MS. VANDYKE: Great.

SPEAKER #2: They can give me copies of the documents they intend to introduce into evidence.

THE COURT: Okay.

MS. VANDYKE: That will be great. Can we set a date for that?

SPEAKER #2: With the medical records stipulation, your Honor --

THE COURT: Yes.

SPEAKER #2: -- it strikes me, the only medical records that need to come into evidence are those that anyone thinks have specific meaning to the injuries that we're now dealing with.

THE COURT: Okay.

SPEAKER #2: Okay? So I think those should be marked separately, by either party, to the extent they intend to use them at trial. Other than that, we stipulated that the medical records are in evidence.

THE COURT: Okay.

SPEAKER #2: Is that fair, your Honor?

THE COURT: How long are you gonna need? Is the 17th too late?

MS. VANDYKE: I thought we stipulated to founda --

SPEAKER #2: That's fine with me.

MS. VANDYKE: -- foundation only. Not all that the medical records were admissible. I'm sorry, but that's what -- the agreement that we've signed off

on.

We need date -- dates for exchange of exhibits --

THE COURT: I said.

MS. VANDYKE: -- and jury instructions, I think is the next step. Is that what we're talking?

THE COURT: Well, no. I want to --

MS. VANDYKE: Oh.

THE COURT: I want to deal with this.

MS. VANDYKE: What?

THE COURT: Your exchange of witnesses.

SPEAKER #2: Of exhibits?

THE COURT: And, and your proposed documents. Is the seven --

MS. VANDYKE: I've already provided those, your Honor.

THE COURT: Okay.

MR. WARD: We don't have anything to change. (Inaudible.)

SPEAKER #2: Your Honor --

MS. VANDYKE: We've already provided it.

SPEAKER #2: -- if Counsel is saying that they are not stipulating to the admissibility of the medical records into evidence? All bets are now off.

MS. VANDYKE: Okay.

THE COURT: You're, you're not stipulating to the medical records?

MS. VANDYKE: Well, your Honor --

THE COURT: I --

MS. VANDYKE: -- because we don't know what they are yet.

SPEAKER #2: You've got -- everything we've got has been produced by them, your Honor.

MR. WARD: Your Honor, that's not true. He sends us a list of 60 names -- half of them we don't even recognize -- of records that he calls medical records that he's gonna put in, and he wants us to stipulate to them.

SPEAKER #2: Your Honor, I --

MR. WARD: We don't even know what he's talking about.

SPEAKER #2: I --

MS. VANDYKE: I have it right here. May I approach and just give you the list?

SPEAKER #2: Your Honor, I'm will -- I'm willing to tell you --

THE COURT: Okay.

SPEAKER #2: -- as I'm standing here today. I have no medical records that they did not provide to me. I will not seek to put in evidence any medical

record that they did not provide to me. But I need a stipulation as to admissibility into evidence, or else we're gonna be here for a couple of weeks.

THE COURT: So he's now offering to stipulate --

MS. VANDYKE: Just --

THE COURT: -- to all of your medical records, and he will produce no red -- medical records that you haven't produced to him. Are you accepting that?

MS. VANDYKE: The problem is, your Honor, without seeing them, I don't know -- we signed releases. And they have stacks and stacks of records, some of which may be inadmissible because they're irrelevant, prejudicial. I don't know until I see them.

I've got such a wide -- she's 55 years old.

THE COURT: Okay.

MS. VANDYKE: As you're aware, there's OB/GYN listed on their records, there's -- I don't know what the records are until we get some answer.

SPEAKER UNKNOWN: (Inaudible.)

MS. VANDYKE: All I want is their pretrial disclosures, and then I think we can enter -- we can make a better assessment.

THE COURT: Okay. So what -- I'm, I'm, I'm a little bit confused. But tell me, he -- you want him to go through your records and tell you which of your records that he intends to rely upon?

He's telling me blanket, up front, he's not gonna rely upon any medical records that you haven't produced. And --

MS. VANDYKE: We'll, we'll give him a copy of all of our medical records, yes. We're just asking that in addition to the ones we're submitting he gives us a copy of those he wants to admit. That's all.

SPEAKER #2: I thought I just proposed that, your Honor.

THE COURT: He did. He, he --

SPEAKER #2: Maybe I'm wrong.

MR. WARD: Okay.

THE COURT: But --

MS. VANDYKE: Okay. Let's set a date for that.

SPEAKER #2: But -- and I want to know if we have a stipulation as to admissibility of those, because otherwise I've gotta get subpoenas out for all these providers.

THE COURT: Well, I think you have a stipulation as to admissibility, subject to you two

exchanging what those documents are.

SPEAKER #2: All right.

MR. WARD: We can do that in five days.

THE COURT: I agree, everybody gets to look at those documents.

SPEAKER #2: Okay, let's do that. And if anyone has an objection --

THE COURT: Bring it back.

SPEAKER #2: -- let's raise it within three days of that so that we can come back up here and figure this out.

THE COURT: I agree. I agree.

SPEAKER #2: Okay?

MS. VANDYKE: Okay. Back to the original issue, which is our objection to their pretrial disclosures. Can we get a new pretrial disclosure? If he wants to list one witness and it will take him five minutes, that's fine.

But as it stands, when he's listed over 110 people --

SPEAKER UNKNOWN: (Inaudible.)

THE COURT: Well, don't --

MS. VANDYKE: That means they can call 110 people in and we've lost our objection.

THE COURT: But he has stipulated today on

the record -- which you may reduce to writing if you want to --

MS. VANDYKE: Okay.

THE COURT: -- he only intends to call one witness.

MS. VANDYKE: Okay. Great.

THE COURT: And who is that, the doctor?

SPEAKER #2: The doctor. Based on the stipulation as to admissibility of medical records.

THE COURT: Right.

SPEAKER #2: If that isn't stipulated to, your Honor, I'm gonna call whoever I need to call to get them into evidence.

THE COURT: Okay.

MS. VANDYKE: Okay.

THE COURT: Okay. And, and that will be cured, because you'll both look at the records and decide what medical records you're gonna have come in. And he's gonna -- and he said for the record today that whatever records you gave him is what he's considering fair game, so.

MR. WARD: Can we agree that we'll have everything exchanged by Monday? He gives us his, and we'll give us -- him ours?

THE COURT: Monday is fine, the 8th.

MR. WARD: Is that okay?
MS. VANDYKE: No.
MR. WARD: (Inaudible) is that okay? (Inaudible) you want to go later?
THE COURT: You want to go the 12th?
SPEAKER #2: Yeah, give us the 12th, your Honor.
THE COURT: We'll go the 12th, Friday.
MS. VANDYKE: Okay, so 9/12.
And what about, do you prefer a stipulated set of jury instructions too, your Honor?
THE COURT: Well, my traditional preference has been you have all my stocks. The only ones I really want from both sides are the ones that you think are particular to your case if you dislike my stocks. You can ask Ms. Allen and she'll mail out the stocks to you.
Usually I give my stock instructions, and then we argue over the ones that you may think are applicable to the Plaintiff's case and you may think are applicable to the Defendant's cases. Those are the ones -- I don't want you both to submit to me the jury can take notes, that they need to pay attention, that preponderance of the evidence, you know.
But which one you want to use for causation,

which one you want to use for damages. I mean, I don't know if there's lost wages, general damages, specific damages, future wages, reductions, actuarials. I mean, I don't know enough about your case to know those specifics.

So those kinds of instructions, yes. And I would like those by the 17th.

MS. VANDYKE: Seventeenth.

THE COURT: But basically I'm gonna give my stock instructions, and then we'll argue about whatever instructions you want specifically given to your case.

SPEAKER #2: Your Honor, where can I get your stocks?

THE COURT: She -- just tell Ms. Allen you want them and she'll download them off the computer or she'll send you a disk.

MS. ALLEN: I, I have them in back. I can run and get you each a copy if you, if you want me to.

SPEAKER #2: Oh, that would be super.

THE COURT: Yeah, we can do that today.

SPEAKER #2: (Inaudible) voir dire, your Honor?

THE COURT: Voir dire. I usually allow -- I usually start the voir dire. I ask a few questions,

because my concern is to make sure that we have a general panel. Then I turn it over and I do allow attorneys to conduct their own voir dire.

The only thing I reserve is -- I'm pretty liberal. But I'll usually cut you off at the knees if I think you're getting out of line, rather than taint the whole pool. I think you're entitled to ask reasonable questions that help you exercise preemptory challenges.

But if I find that you are educating the jury, or you're trying to lay the foundation for your theory of the case in such a way you're trying to argue it or convince them as opposed to just giving them examples, I'll probably cut you off. We'll excuse the jury. And we'll talk about where you're heading.

But I do allow you full rein to follow up because I don't have to exercise preemptory challenges, you do. And so there may be some nuances as to why you would want to excuse a juror for some reason less than cause that's not important to me.

I usually start with the Plaintiff, then I give the defense follow up. You have full rein. If there are questions that you want me to ask -- a lot of times tort liability questions or those kinds of

things -- I would like those by the 17th as well. The questions that you want me to ask.

Sometimes they come across better if the judge is asking those questions. But by and large I let you guys -- you folks ask whatever questions you want to ask.

MR. WARD: How big will our pool be, your Honor?

THE COURT: Well, I was gonna ask you how big you thought we needed it to be. Our -- I've heard of Schindler Elevator Company. I don't know Ms. Florez. Twenty-five is normally -- 25/35 is what we call. I have gone to 50 in high profile cases, but.

MR. WARD: I would think 25 to 30 would be fine.

THE COURT: Because we only need eight.

SPEAKER #2: That should be fine.

THE COURT: Okay.

MR. WARD: I think one other thing I was gonna have, have an opportunity to mention this to Scott or to you, your Honor, but I believe this -- for us to discuss.

I have found everybody well served in trials with this kind of adjusted schedule that you may have heard about, where you start your trial at 8 and end

it like at 2:30. So that they can get back to their office in Salt Lake, and everybody has some time.

I have some judges that love to do that, and we've done that. I've had other judges say, No, I want to do the normal 9 to 5. And I, and I just leave it out there for whatever. Since they're traveling from Salt Lake (inaudible.)

SPEAKER #2: I think it's, I think it's a great schedule, your Honor. I've done it quite a bit, and (inaudible.)

THE COURT: I don't, I don't have a problem with it, as long as you guys know I'm butting up against another trial that starts on the 29th. You have to be through in four days. I -- and I am breaking Wednesday. We're going Monday, Tuesday, break Wednesday, and come back Thursday and Friday, so.

MR. WARD: With, with them admitting liability and having their one main witness I can't imagine --

THE COURT: Okay.

MR. WARD: -- just can't imagine we wouldn't be done.

THE COURT: I don't mind breaking earlier in the day, 2:30, 3:00. That, that's fine.

SPEAKER #2: Just, just so we're clear, what we're admitting is the element of negligence, your Honor.

THE COURT: Right.

SPEAKER #2: Okay?

THE COURT: Okay.

SPEAKER #2: So --

THE COURT: So I don't, I don't have any problems with --

MR. WARD: Is everybody okay with an 8:00 start?

THE COURT: Oh, I don't know if my staff's okay with an 8:00 start.

MR. WARD: That's why (inaudible.)

THE COURT: I -- when you said --

SPEAKER #1: (Inaudible.)

THE COURT: I was thinking, I was thinking in terms of the other end. I wasn't thinking of starting earlier.

SPEAKER UNKNOWN: The jurors, the jurors have to be here a little bit early, so the door will have to be (inaudible.)

THE COURT: We'd be -- if we're gonna start early we'd have to start at 8:30 would be the earliest, because the building doesn't open till

eight. So I've got problems getting jurors in at 7:30 to be here at 8. That --

MR. WARD: So it opens at 8:30, or it opens at 8?

THE COURT: No, it opens at 8. So I could have them in the building, searched, and ready to go at 8:30. I -- she's right, I can't have them ready to go at 8 because we don't open the building that --

MR. WARD: Then maybe we could, if everybody would agree, lunch would be 30 or 40 minutes instead of an hour or an hour and-a-half.

THE COURT: Okay.

MR. WARD: (Inaudible) kind of get the business done so everybody can go home.

THE COURT: I don't have a problem with that. So we'll plan on starting at 8:30.

MR. WARD: Okay.

THE COURT: And capping the day somewhere around three, depending upon witnesses. My -- I'll be candid. My experience with the flex days is we've been held hostage by our witnesses. Particularly doctors, who can only come a certain day at a certain time.

And so you folks move through the case much faster than they do, and then we've got a two-hour

block where we have to wait because Doctor X or Doctor Y can't come in.

MR. WARD: Yeah.

THE COURT: But yes, I don't have any problems with starting at 8:30. I don't have any problems with capping it at 3:00. I don't have any problems with flexibility during the lunch hour either.

But I think we almost have to say that's the general approach we're gonna take, but day-to-day we have to assess where we are with our witness.

SPEAKER #2: Yeah.

THE COURT: Okay.

SPEAKER #2: Yeah. With regard to that, my, my medical expert's scheduled to be here on Thursday.

THE COURT: Okay.

SPEAKER #2: I assume that would be a good time?

THE COURT: That would be an excellent time.

SPEAKER #2: I assume we have some flexibility with regard to witnesses if --

THE COURT: Yes.

SPEAKER #2: -- we need to take them out of turn?

THE COURT: Yes.

SPEAKER #2: Thank you.
THE COURT: Yeah, we can take them out of turn.
MR. WARD: Is that Thursday morning?
SPEAKER #2: Yeah, Thursday morning.
THE COURT: Yeah, okay. Anything else we need to address?
All right. We'll see you all back on the 22nd, 8:30, ready to go. Thank you.
MR. WARD: Well, if we're gonna start at 8:30, your Honor, I wonder, particularly if we have some jury instructions or anything to go through at all, should we get together on a phone conference maybe the day before?
THE COURT: Well, I, I'm expecting you to submit those to me by the 17th.
MR. WARD: (Inaudible.)
THE COURT: I will review them, and then I'll call you. I mean, I'll, I'll follow up on that if we have some issue.
MR. WARD: Okay.
SPEAKER #2: Okay.
MR. WARD: So maybe we can think of things (inaudible) before if we need to --
THE COURT: Right.

MR. WARD: -- tie ends up?
THE COURT: Yes.
MR. WARD: Thank you, your Honor.
THE COURT: Okay. Thank you.
SPEAKER #2: Thank you, your Honor.
THE COURT: Have a good day.
(End of recording.)

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

This is to certify that the foregoing transcript was prepared by me, KELLY L. WILBURN, a Certified Shorthand Reporter and Registered Professional Reporter in and for the State of Utah.

That the transcript was prepared from a previously-recorded proceeding at which I was not personally present; therefore, the quality of said recording may affect the quality of the transcript.

That said recording was then written in stenotype by me and thereafter caused by me to be transcribed into typewriting. And that a full, true, and correct transcription of said recording so taken and transcribed to the best of my ability is set forth in the foregoing pages, numbered 1 through 55, inclusive.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

SIGNED ON THIS 5th DAY OF January, 2010.

_____
Kelly L. Wilburn, CSR, RPR
Utah CSR No. 109582-7801

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